

September 26, 2006



TRANSCRIPT
September 26, 2006

MONTGOMERY COUNTY COUNCIL

PRESENT

George Leventhal, President	Marilyn J. Praisner, Vice President
Howard Denis	Michael Knapp
Steven A. Silverman	Nancy Floreen
Michael Subin	Phil Andrews
	Thomas Perez



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Council President Leventhal,

Is the Reverend Ginger Luke here? Please, let's begin with an invocation.

Reverend Ginger Luke,

I'm Ginger Luke from River Road from The Unitarian Church in Bethesda. In the name of all that is holy and sacred, let us pray. We are thankful for the people on this council, for the time and energy they offer for each of us in this community. We are thankful that they attend to the minute details and to the expansive plans for the future. We are thankful that they are able to hear the many diverse voices of this community and to respect them all. May they receive in plenty: gifts of patience, discernment, wisdom, and compassion. And may they begin this day holding the well-being of all of us in their hands and in their hearts. Amen.

Council President Leventhal,

Amen. Thank you very much. Ms. Lauer, are there any agenda or calendar changes this morning?

Linda Lauer,

We have a couple of changes. Consent calendar -- we have on the consent calendar introduction of several -- it's a package of special appropriations and CIP amendments that we have received from the park and planning commission. It mostly deals with program open space funds. If I can just read the list real quickly -- the projects are: acquisitions, local parks, non-local parks, South Germantown Soccerplex, Lake Needwood Restoration, ball field initiatives, restoration of historic structures, and then CIP amendments dealing with the Rock Creek Trail pedestrian bridge, and the Wheaton tennis bubble renovation. They will all go to public hearing on October 17th. And the PHED committee will consider it after that. Actually, the PHED committee will be receiving a briefing on these projects on Thursday. And we have no petitions where we see this week. I just need to let everyone know that there is a potential need for a Council special session on Friday to look at the ballot questions if the court determines that's necessary on Thursday. Thank you.

Council President Leventhal,

Thank you. Are there minutes for approval?

Council Clerk,

The minutes of August 1st and 15th for approval.

Council President Leventhal,

Mrs. Praisner has moved, and we need a second for the approval of the minutes. Mr. Denis has seconded approval of the minutes. Those in favor will signify by raising their hands. It is unanimous among those present. Turn now to the Consent Calendar. Are there any comments or questions regarding the Consent Calendar? Vice-president, Praisner.



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Councilmember Praisner,

I will move approval of the Consent Calendar. We are adopting the National Incident Management System, NIMS system. And I know that this is an important requirement relative to both the federal structure, the president's directives, and most importantly the requirement that not having adopted it we will not -- unless we adopt it, we will not have access to federal grants given the series of requirements. But within the NIMS document, itself, I had two questions -- and I apologize for the fact that I didn't raise them last week. There's no reference, Gordon, to the Revenue Authority. And since the Revenue Authority is an arm of government and runs institution facilities, I wondered about why the Revenue Authority isn't referenced in the document. Secondly, there are lots of follow-ups, obviously, as the memo from the County Executive indicates of tasks that still need to be addressed. I assume the Committee will be looking at that. And you can give us timeframes, because the assumption is that you just adopt the policy, but you have the elements of the policy in place. So, I guess the only question I had, that is meaningful for right now, is why the Revenue Authority is not referenced.

Gordon Aoyagi,

Thank you very much, Councilwoman Praisner. We appreciate your comments. When we looked at all the various departments and agencies, including those that are semi-county-state agencies, we put together that list. With regard to the Revenue Authority, and your point is well taken, they may have --

Councilmember Praisner,

Since they operate the airport.

Gordon Aoyagi,

Yeah.

Councilmember Praisner,

I thought that we needed to perhaps add the Revenue Authority in some way, and make sure that the Revenue Authority is part of our National Incident Management System and coordination. If not the golf course or the apartment buildings, the airport rings most importantly from my perspective.

Gordon Aoyagi,

That's exactly what I was just going to say. And, so, we would certainly entertain --

Councilmember Praisner,

So, can we, by consent of the Council, Mr. President, add the Revenue Authority to the list of agencies that will be required to work in this coordinated fashion?

Council President Leventhal,

Without objection, it will be added. Let me note that Mrs. Praisner had moved and Mr. Andrews had seconded approval of the Consent Calendar. And we will, without objection, add the Revenue Authority, as Mrs. Praisner suggests. Are there any further comments on the Consent Calendar? Mr. Knapp.



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Councilmember Knapp,

Thank you, Mr. President. I appreciate Mrs. Praisner's comments. The only thing I would add, for when the Committee takes up further consideration of the other elements associated with implementation of the National Incident Management System, is just how much federal contribution do we have for the time and resources that are required at the local level -- I know the answer. It's more rhetorical. But I figured we ought to ask it anyway. For our assistance in actually implementing all of these elements at the federal mandate. I'm pretty sure the answer is 0, but I'd like to make sure we continue to focus on that, especially as we look at resources flowing through the NCR and back through the state as we try to implement these things. I think it's something we need to continue to shine the light on.

Gordon Aoyagi,

Just in very quick response -- we have received some [USC] funding to help support the coordination and implementation of training. We are not reimbursed for the actual training, itself.

Council President Leventhal

Okay, Mrs. Praisner, was there something else?

Councilmember Praisner,

I just wanted add that the National Association of Counties, under the leadership of a county resident, is preparing a NIMS guide for local elected officials. And maybe the committee might want to look at that, as well, and we can, perhaps, make suggestions on the guide, as well. And that will be part of the discussion tomorrow.

Council President Leventhal,

Okay, excellent. If there are no further comments on the Consent Calendar, all those in favor of its adoption, will signify by raising their hands. The Consent Calendar is unanimously approved among those present. We turn, now, to a resolution to approve budget priorities and performance measures. The MFP committee has worked on this, and we, the Council have received extensive comments from the public. We had a public hearing, and we received a number of letters in response to our requests. We are very grateful for those in the community who weighed in on our budget priorities at this early stage. It's helpful several months before we get into the hectic schedule and the really intense activity around the budget, to be able to take a broad view, sort of step back and consider what the community's priorities are. So, we're very grateful to all those who weighed in. And, I'm going to ask the chair of the MFP committee, Vice-president Praisner, not only to walk us through this, but to preside over the Council for just a few minutes while I step out.

Councilmember Praisner,

Sure. Thank you. The committee had a meeting yesterday on the operating budget priorities and performance measures, and discussed Mr. Farber's packet. As Mr. Leventhal indicated, the Council President indicated, this is, obviously, very early in the



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1 process and we are learning about this approach to the Operating Budget Priorities and
2 Performance Measures, working along with the community on the variety of attempts to
3 look at the operating budget beyond the budget cycle. And, also, to look at performance
4 measures. We had a public hearing as Mr. Leventhal indicated, and received written
5 comments and testimony from the agencies of county government, as well as school
6 system, Planning Board, college, and park and planning in highlighting their own
7 processes for identifying budget priorities at this early point. The Committee also
8 acknowledged that as we discussed suggestions for refining, modifying the resolution
9 that, obviously, with a transition to a new Council and county executive, there are,
10 obviously, going to be other individuals who want to weigh in who have not as yet had
11 an opportunity from an elected official prospective. That said, the committee -- and Mr.
12 Roamer's response for county government, makes very firm note of the assumption and
13 deference to the incoming County Executive on the issue of budget priorities and
14 performance measures. One of the interesting testimony we received related to the
15 issue of performance measures, and monitoring, and refining, and looking at that issue,
16 Mr. Zepp, who's had some experience as a community leader, from a community
17 prospective, a civic leader, also made references, given his professional experience, to
18 issues of improving performance measures. With that this mind, the committee had just
19 two slight modifications. One of which is to add to the end of the resolution a sentence
20 about outcomes, and I'm looking for the resolution, the final resolution with our language
21 in it. It says "the Management of Fiscal Policy Committee will review with the agencies
22 this fall before they transmit how they will deal with the budget priorities. We also will
23 look at the issue of accountability, performance measures and the issue of approving
24 government effectiveness, including appropriate tools, employee training, and
25 accountability measures." And that was a unanimous recommendation. The other
26 recommendation was given the overwhelming commentary that we've received from the
27 community on issues -- an issue that's cross-cutting, to some extent, because it involves
28 multiple agencies of government is the issue of after-school programming, and it's
29 relationship to gang prevention issues, as well as education effectiveness, and
30 recreation, and child care. So we added the term "such as" after-school programs, not
31 suggesting that that will automatically be included, or that it's the only one. But using it
32 as an example of something that goes beyond the traditional education focus that we've
33 had in the past. The Committee unanimously recommends adoption of the resolution
34 with those modifications. Mr. Knapp.

35
36 Councilmember Knapp,

37 Thank you, Madam Chair, Madam Vice-president. I appreciate the Committee's efforts,
38 and thank Mr. Farber for his efforts as well. And I appreciate the modifications that
39 you've made. One of the things that I was struck by in the testimony that we received
40 was, as we continue to figure out how to engage in a budget dialogue, proceeding the
41 actual budget itself, but trying to give guidance back to the departments and agencies,
42 is the greater level of specificity that we received from many of the departments as
43 opposed to being supportive of just education, that people actually identified ways in
44 which we should be supportive of that, such as, just as the committee recommended,
45 focusing on after-school programs. And to that end, I am particularly appreciative of
46 some of the testimony received from Montgomery College where they actually went in



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1 and specified their three top priorities. And of those three priorities, they even ranked
2 the priorities, which is unusual for our departments or agencies to actually do that. So I
3 thank the college for really trying to kind of show what is important to them. I agree with
4 the comments, as it relates to the -- that the performance measures are looking at
5 before budgets are transmitted as to having them come back to the committees to look
6 at ways to review the government effectiveness and appropriate tools. My chief of staff
7 is on maternity leave right now, and so as a result, I have been taking a more active role
8 in doing my employee evaluations than I did last year. One of the things that I was
9 struck by, as we do this kind of throughout county government, is what is the context in
10 which we actually evaluate individual performance? And one of the things that is -- I can
11 do with my office of five people -- but how do we, in previous environments where I've
12 worked, there are, usually, a couple of different factors that you look at. What is the
13 overall performance of the large entity? In this case, county government. What is the
14 performance of the actual department or unit, itself? And then, what is the performance
15 of the individual within that unit? And so, you have context within which to determine
16 how an individual actually succeeded, and how the overall objectives were met by it,
17 from an entity perspective. There seems to be some disconnects, still, which I hope that
18 we can begin to address as we a new County Executive coming in. That we can really
19 work with the incoming County Executive to come up with a way to more specifically tie
20 our performances to the budget requests, themselves, so that they are not kind of
21 disjointed. I know a lot of efforts have been made to do the Montgomery Measures Up
22 book, but it's still a piece that's assessed over here while we look at the budget over
23 here. If that's a way to marry those documents up, I think it would help all of us as we
24 better make decisions as we get to our budget activities in April. And so, I appreciate
25 the efforts of the committee in trying to recognize that piece. And hope that we can work
26 in the next couple of months to really address that and come up with some more
27 effective tools to really implement that.

28
29 Councilmember Praisner,

30 The other discussion that we've had, off and on, both at this table and in the committee
31 is the issue of that disconnect between Montgomery Measures Up and the actual
32 budget development. Some of that is the timing of when the data is available, the status
33 of that information. Other issue is the quantity of measures within Montgomery
34 Measures Up, and some suggestions that we need to refine that further, and not be so
35 extensive, perhaps, with some programs having three and four different measures,
36 which may complicate the capacity to do the monitoring rather than help with the
37 evaluation that needs to take place. Mr. Andrews.

38
39 Councilmember Andrews,

40 Thank you, Mrs. Praisner. I wanted to, first, commend you for the good work that you
41 did this year, and have always done, on helping the Council and the public understand
42 the choices and the challenges in meeting the many needs at the county, while
43 continuing to be able sustain the budget. One of the big challenges that we are going to
44 have in the coming year, which has been subject to a lot of discussion over the last year
45 in the MFP committee, is the new requirement of Governmental Accounting Standards
46 Board to show what the funding obligations is for long-term obligations like pensions,



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1 healthcare, that kind of thing. And the estimate is that for the county to fully pre-fund
2 that next year would require, at least, \$160 million, and probably significantly more, if we
3 were to do that all in one year, which is very unlikely. It's almost certain that we are
4 going to have to do a significant chunk, at least a fifth or a quarter of that amount next
5 year. So, something in the range of \$30-50 million is likely going to be needed to be set
6 aside at the beginning of the budget for that purpose, which is a whole new obligation
7 that we haven't faced before. And although not legally required to do that, if we don't do
8 that, we'll very likely, at some point in the not-too-distant future have our bond rating
9 marked down, because the rating agencies will expect a AAA government to do that, to
10 put that money aside, in an orderly way. So, that is a new challenge the next Council
11 will face that will make it more challenging to fulfill all the valid and worthy requests that
12 we're receiving from various people and organizations. And I think it's just important to
13 get that information out, early on, so that people understand that that's a new factor in
14 the budget that wasn't here this year or last year.

15
16 Councilmember Praisner,

17 I see no other lights, so the motion is in front of us on behalf of the Management of
18 Fiscal Policy Committee. Those in favor can indicate by raising your hand. It is
19 unanimous. Back to you, Mr. President.

20
21 Council President Leventhal,

22 Thank you, Madame Chair and Vice-president. We now turn to approval of the
23 Schematic Development Plan, Amendment 06-3. There is no report from the Hearing
24 Examiner. The applicant's request was approved by the planning staff, and approved by
25 the Planning Board. I see Mr. Grossman is here to answer any questions. Do you have
26 a presentation, Mr. Grossman?

27
28 Marty Grossman,

29 No. This is one of those types of cases that do not go before the Hearing Examiner.
30 There is no opposition. And the Planning Board did not request a hearing.

31
32 Councilmember Floreen,

33 I move approval.

34
35 Councilmember Praisner,

36 Second.

37
38 Council President Leventhal,

39 Okay. Ms. Floreen has moved. And Vice-president, Praisner, has seconded approval of
40 DPA 06-3. No one is requesting to speak on this matter. Those in favor of approval will
41 signify --

42
43 It's a roll call vote.

44
45 Council President Leventhal,

46 Oh, it's a roll call vote. The clerk will call the roll.



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Clerk,
Mr. Denis.

Councilmember Denis,
Yes.

Clerk,
Ms. Floreen.

Councilmember Floreen,
Yes.

Clerk,
Mr. Silverman.

Councilmember Silverman,
Yes.

Clerk,
Mr. Knapp.

Councilmember Knapp,
Yes.

Clerk,
Mr. Andrews.

Councilmember Andrews,
Yes.

Clerk,
Ms. Praisner.

Councilmember Praisner,
Yes.

Clerk,
Mr. Leventhal.

Council President Leventhal,
Yes. DPA 06-3 is approved by a vote of 7-0. We turn, now, to Zoning Text Amendment
06-20, Mixed-Use-Town Center – Transfer of Development Rights Zone. This has been
recommended to the Council by the PHED committee. Chairman Silverman.

Councilmember Silverman,



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1 Thank you, Mr. President. The committee unanimously recommends ZTA 06 –

2
3 Council President Leventhal,
4 Chairman Silverman, could you hold for just a moment.

5
6 Councilmember Silverman,
7 Sure.

8
9 Councilmember Knapp,
10 I apologize. I just wanted to let my colleagues know I have to go to a funeral. And so, I
11 will be missing, probably, the next hour to two hours of our morning session. So, I
12 apologize for missing any votes, but will catch back up when I get back.

13
14 Council President Leventhal,
15 We're sorry for the circumstances under which you have to leave, Mr. Knapp. Mr.
16 Silverman.

17
18 Councilmember Silverman,
19 Thank you, Mr. President. The committee recommends, unanimously, ZTA 06-20 be
20 approved, as submitted. This implements the recommendations of the Damascus
21 Master Plan. It provides receiving areas for transfer of development rights and,
22 otherwise, establishes standards that are identical to the Mixed-Use-Town-Center Zone.
23 There were staff comments that are contained on page two, which I honestly can't
24 remember whether when we incorporated, Jeff. Do you remember whether we did? I'm
25 trying recall if we incorporated your comments. Your comments were just general
26 comments.

27
28 Jeff Zyontz,
29 My comments were general. I had made an error, a recommendation to make an
30 amendment that was already being made. Mainly because the draft that I had from the
31 Planning Board had underlining and the added language was not there. So, it is fine as
32 introduced.

33
34 Councilmember Floreen,
35 Did we include a quote from Albert Einstein?

36
37 Jeff Zyontz,
38 No quotes in this one.

39
40 Councilmember Silverman,
41 When they start including them as footnotes in the actual zoning ordinance – so, that's
42 the report. 3-0

43
44 Council President Leventhal,
45 Okay. Mr. Denis.



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Councilmember Denis,

Thank you, Mr. President. This is a nature of colloque, I have discussed with Chairman Silverman, and my staff has discussed this matter with his staff. It is not my intention to delay this, or to vote against it, but rising from this ZTA, I would like to make a suggestion for future consideration. The MXTC/TDR Zone parallels the MXTC Zone, and the MXTC Zone requires a bank to obtain a special exception if it includes drive-through lanes. I am perplexed as to why the MXTC Zone contains that provision. I would like to suggest that the Council, and perhaps the PHED committee, explore the requirement in time. We have branch banks with drive-through windows in Bethesda and Silver Spring. As near as I can tell, they do not require a special exception. I'm not suggesting that we amend ZTA 06-20 today to eliminate the special exception requirement for drive-through lanes for banks, but I would like us to look into making that change to both the MXTC Zone and the MXTC/TDR Zone as soon as possible, following the installation of the next Council. Thank you, Mr. President.

Council President Leventhal,

Okay. Thank you, Mr. Denis. I see no further comments on ZTA 06-20. The clerk will call the role.

Clerk,

Mr. Denis.

Councilmember Denis,

Yes.

Clerk,

Ms. Floreen.

Councilmember Floreen,

Yes.

Clerk,

Mr. Silverman.

Councilmember Silverman,

Yes.

Clerk,

Mr. Andrews.

Councilmember Andrews,

Yes.

Clerk,

Ms. Praisner.



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1 Councilmember Praisner,
2 Yes.

3
4 Clerk,
5 Mr. Leventhal.

6
7 Council President Leventhal,
8 Yes. ZTA 06-20 passes on a vote of 6-0. We now take up Damascus Sectional Map
9 Amendment #G-854. The PHED committee recommends approval. Chairman
10 Silverman.

11
12 Councilmember Silverman,
13 Thank you, Mr. President. These are Sectional Map Amendments, which implement the
14 zoning recommendations of the master plan. The committee recommends approval of
15 the SMA as submitted – I'll just go through these real quickly. Committee
16 recommendation and – is this about this?

17
18 Amanda White,
19 Yes. Keep going.

20
21 Councilmember Silverman,
22 Okay. Are you going to tell me what this is about?

23
24 Marlene Michaelson,
25 If you want me to do that right now. Yeah, this is just a suggested footnote to the
26 acreage table in the opinion, because there has been some question.

27
28 Councilmember Silverman,
29 All right. Then, we will get to that in just a second. Fine. On Ridge Road North Transition
30 Neighborhood Properties, the committee recommendation was unanimous to retain the
31 plan recommended RE-1 Zoning, because there's no new information warranting
32 invalidation of the Council's earlier decision in the Master Plan. In connection with the
33 Miller Property, again, same rationale, same unanimous recommendation. The Kramer
34 property, I abstained. The Committee did recommend, unanimously, retaining the plan-
35 recommended MXTC/TDR Zone for this property, because the property owner did not
36 provide new information to justify changing the Master Plan recommendation for TDRs.
37 On this property, in connection with the Kingstead property, the committee's
38 recommendation is to not rezone additional until the timing and location of King's Valley
39 Road is clear, and include language in the approval resolution note. And that the
40 Council supports rezoning of all portions of this property, east of King's Valley Road,
41 once the timing and location are known. And, finally, allowable uses in the Town Center
42 Zone, the committee did not recommend modifications to the MXTC Zone, because all
43 the uses that are currently in the Damascus Town Center Area are allowed in the MXTC
44 Zone. Now, you want to tell us about...

45
46 Marlene Michaelson,



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1 Yes. If you turn to Circle 3 of the packet...this is standard language that lists the
2 acreage of each property. Typically, the acreage does exclude the right-of-ways;
3 however, we had some property owners who were confused about this. This footnote
4 simply clarifies what the zoning ordinance steps are. That the zoning map and the
5 acreage excludes the right-of-ways, but the right-of-ways are treated as being zoned the
6 adjacent acreage. And that density is counted when they develop. And so this just
7 clarifies this standard practice.

8
9 Council President Leventhal,
10 Okay. Ms. Floreen.

11
12 Councilmember Floreen,
13 Thank you. I have a question, request for clarification. I thought we zoned to the middle
14 of the right-of-way. Isn't that the way it works?

15
16 Marlene Michaelson,
17 Where it is a public right of way, and on this, I have actually quoted the language that's
18 in the zoning ordinance that says "official zoning maps will not depict the zoning within
19 existing right-of-ways. However, those right-of-ways are to be classified in the least
20 intensive of adjacent zones." So, it is not that it is not zoned; it is simply how we portray
21 it in the SMA and on the map. And, therefore, it is a little bit confusing. We were hoping
22 that this footnote explains that they do take the zoning of the adjacent land, but the
23 acreage that is shown on the map does not include it.

24
25 Councilmember Floreen,
26 I guess I'm not entirely clear why we are having this conversation about right-of-ways,
27 because if it's dedicated, it's public.

28
29 Marlene Michaelson,
30 Right.

31
32 Councilmember Floreen,
33 And that's that. And if it's not dedicated, it's not a right of way.

34
35 Marlene Michaelson,
36 Right. We had property owner say that the chart that you see on Circle 3 did not include
37 the land in the right of way. And that is typically what's done in this chart and on the
38 map. So, we're simply clarifying.

39
40 Councilmember Floreen,
41 Is that a proposed right of way, or an existing right of way?

42
43 Marlene Michaelson,
44 On this particular property...proposed, but it's what's all proposed.

45
46 Councilmember Floreen,



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1 If it hasn't been dedicated, it's not anything, other than an idea?

2
3 Marlene Michaelson,

4 That's correct. But, this has been the way we've handled it. And I think the footnote
5 should explain how we're handling it.

6
7 Judy Daniels,

8 Maybe I can help clarify this. In our practice -- this property owner raised the question,
9 because the acreage shown was less than he anticipated. This is a zoning map. This is
10 not a property map. The right-of-way is going through this property. The zoning will be
11 the same on either side. This is indicating the areas that would be zoned. This is not an
12 indication of...his concern was how his density would be calculated when they come in
13 for development --.

14
15 Councilmember Floreen,

16 I'm not interested in the property owner's concerns, so much as just whatever it is that
17 we're doing, that we be straightforward about it. It would just seem to me, on a
18 technical, legal level that until something's dedicated, it's not dedicated, which means
19 it's not ours to make a judgment about, other than to zone it.

20
21 Judy Daniels,

22 We have not -- this is no different from what we have done before. He looked at it
23 differently than other people have in the past. And just to clarify it for his sake.

24
25 Marlene Michaelson,

26 We can, certainly, look at the issue, whether in the future we should be zoning proposed
27 right-of-ways and not zoning existing right-of-ways. I believe that's your concept. But
28 this is how we've done it.

29
30 Councilmember Floreen,

31 Yeah. It just seems to me that you can't assume anything until it actually comes through
32 some approval process and is approved or not. You just need to be careful, it seems to
33 me, on this subject.

34
35 Judy Daniels,

36 Yes, ma'am.

37
38 Councilmember Floreen,

39 And I would ask that you make absolutely sure that you haven't assumed anything.

40
41 Marlene Michaelson,

42 We can look at that a little further.

43
44 Councilmember Floreen,

45 Just because you have done it in a plan, as you know, doesn't mean it's going to
46 happen.



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1
2 Jeff Zyontz,

3 If I may -- the issue often arises where the land owner had dedicated, already, and then
4 developed. And that sometimes does occur. And then they're interested in, do they get
5 density off of the right-of-way they already developed?
6

7 Councilmember Floreen,

8 Whatever that argument is, leave that to another day. I'm just saying, if something's
9 been dedicated to the public, it's the public's. And if it hasn't, it's not. I would just ask
10 you to confirm that that's the approach that we have taken in zoning. And if you're
11 saying that is our approach, good. But, don't assume anything.
12

13 Marlene Michaelson,

14 Right. Historically, that has been our approach. But I think you're raising an issue about
15 whether we want to reconsider, or clarify, how it should be done in the future.
16

17 Councilmember Floreen,

18 Are you saying we're assuming certain things that haven't occurred here?
19

20 Judy Daniels,

21 I think, in the terms of the zoning map, that it has been sometimes confusing when the
22 road right-of-way is not shown. Therefore, it would be better to show it going through.
23

24 Councilmember Floreen,

25 Has the road right-of-way been established? That's my question.
26

27 Judy Daniels,

28 Yeah. It hasn't yet.
29

30 Councilmember Floreen,

31 Has it? Yes or no.
32

33 Judy Daniels,

34 It has not yet.
35

36 Councilmember Floreen,

37 Then we don't know what it is.
38

39 Marlene Michaelson,

40 Okay. If it's your preference --
41

42 Councilmember Floreen,

43 It hasn't been established, so we don't have it.
44

45 Marlene Michaelson,



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1 To add the acreage back, we can get that information and bring it back to the Council
2 later today. If that's the approach Council wants to take.

3
4 Councilmember Floreen,

5 Well, I'll leave it to the legal eagles on this subject. But I just don't know that you can just
6 assume anything until it has gone through some sort of formal process, and the
7 Planning Board, or whoever has accepted the right-of-way designation. We talked about
8 this, with respect to another matter, in the map amendment process where we didn't
9 know where the road was going to go, so we were not taking a position on it. It would
10 seem to me we'd want to be consistent both ways.

11
12 Marlene Michaelson,

13 Right. And in that case, it was...we had a potential right-of-way where the zone was
14 different on either side of the right-of-way. So we were trying to decide if we could
15 rezone part of the property. It wasn't actually the right-of-way zoning that was being
16 discussed.

17
18 Councilmember Floreen,

19 That's the approach that we took -- which one was it? The Kingstead property, because
20 we didn't know where the road was going.

21
22 Judy Daniels,

23 The zoning was different on the either side.

24
25 Councilmember Floreen,

26 Only, we didn't know where the road was going to go. And this is a similar, seems to me
27 a similar --

28
29 Judy Daniels,

30 Except the zoning is the same on either side.

31
32 Marlene Michaelson,

33 This is not going to impact the zoning designation.

34
35 Judy Daniels,

36 Or the density of the property.

37
38 Councilmember Floreen,

39 Again, it's not the density issue, or any of these things that I'm concerned about. I just
40 want to make sure that we don't assume things until they're finalized. I, honestly, am
41 deferring to a legal analysis of what is the technically appropriate approach there. If we
42 have reached that approach fine. But this language, I don't think offers us -- right-of-
43 ways don't exist until they have been dedicated. Right? Correct. So our action should be
44 consistent with this not assuming. I think we need to think about this a little bit longer, if
45 you think we need to.



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1 Marlene Michaelson,
2 Councilmember Floreen, I recognize your concern, and I actually think you are going in
3 a direction that is correct. I guess my only sense is that the department tell us me that,
4 historically, this is what they have done on other properties. And so, I think there are two
5 options here. One is to say this is historically how we've done it, and we're going to
6 continue to do it for this particular map amendment and reconsider whether this is the
7 right approach going forward. Or, alternatively, if you feel that this is the appropriate
8 time to make a change in this practice, then we'll figure out the acreage difference and
9 change it here.

10
11 Councilmember Floreen,
12 Well, I see Mr. Hansen has joined us. Maybe you could take a timeout and just think
13 about it.

14
15 Judy Daniels,
16 It's about 6-acres difference.

17
18 Councilmember Floreen,
19 I don't feel strongly about the numbers, as much as consistent policy approach on this.
20 That is consistent with the law.

21
22 Marc Hansen,
23 I think you're absolutely right. If, for some reason, the dedication turns out differently
24 than it appears on the zoning map, what's the consequence of that? The footnote that
25 Marlene talked about, I think, resolves that issue, because it says that the land shown is
26 being dedicated is not left unzoned. It is zoned. So that even though the dedication may
27 switch, I don't think the zoning maps end up creating a problem because of the footnote.

28
29 Marlene Michaelson,
30 And the boundaries of the areas to be zoned are going to be the same. On the zoning
31 map, if there is an area that's...I'm not sure how they are even going the show on the
32 zoning map the proposed right of way, but the entire area is zoned. It's not as if this was
33 on the edge of a property, or between two different zones. So, for this particular
34 property owner, I don't think there's going to be a problem. But as a process matter, I
35 think you're raising an issue we need to look into it for future estimation. I completely
36 concur with you there. And the only question is whether you think this process needs to
37 be changed today.

38
39 Councilmember Floreen,
40 I don't want to delay this for any reason. But I just want to make sure that we're
41 straightforward about this, and not making it more complicated based on assumptions
42 about things that might occur. If Mr. Hansen says this language makes it clear enough,
43 okay. We just had a committee meeting addressing split zoning issues yesterday. So,
44 it's fresh in my mind about the need for real clarity when we do this mapping, because
45 this is where the rubber really does hit the road for long-term clarity purposes. Mark, you
46 think it's okay with this language?



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Marc Hansen,
I do, Ms. Floreen.

Councilmember Floreen,
Okay. All right.

Council President Leventhal,
Ms. Praisner.

Councilmember Praisner,
On that issue, I think it does warrant some conversation in the generic sense, not in the specific master plan. I think Nancy has raised good questions. And the responses generate, I think, some need to have this conversation. I'm a little troubled by responding to one property owner who would require us to add something that we haven't added anywhere else in another SMA. So for the record, the absence of this language in other SMAs does not mean that those SMAs do not treat this issue any differently. There is consistency with the approach. We are just adding this language in order to be responsive to one property owner. I think the question of doing that is also an issue to be discussed in the future. If a property owner raises a question that is consistent, and the answer is that this is the way we've done it and you can point some other document, I don't believe we should just add something to an SMA at the issue of a property owner, if it's consistent County policy and has not existed in language elsewhere in other SMAs. Because it will raise questions. That's why I'm saying, for the record, I assume, and you are nodding, and everyone is nodding, this is policy. It's just that we're putting it here to be responsive to one property owner's question.

Marlene Michaelson,
We have a footnote that is just citing a zoning ordinance.

Councilmember Praisner,
Right. But, my point is that footnote has not appeared in any other SMA, that I can recall acting on. And, therefore, I want to make sure folks are clear that the inclusion of this, here, is to be a belt suspender and whatever else. But it does not change any policy in its absence, in any other SMA, does not mean anything about inapplicability. It still applies. My question, and the reason I put my light on is, I want to be clear when you say on page four that the committee recommended adding language to the resolution noting that Council supports the rezoning of all portions of Kingstead property, east of King's Valley Road, once timing and location of the road are known, what you are saying is once one knows what part of the property will be east of, and that the rezoning relates to the ultimate outcome of the property east -- what property ends up being east of. So it's not all portions of the property, but those portions of the property that will eventually be east of is what we support and would come back to us in an SMA at that time. I just don't want somebody looking at the word "all" and saying it relates to the entire property. It's all portions that wind up being east of. Thank you.



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1
2 Marlene Michaelson,
3 Yes.

4
5 Council President Leventhal,
6 Okay. Are there any other comments on the Damascus Sectional Map Amendment? If
7 not, the clerk will call the roll.

8
9 Clerk,
10 Mr. Denis.

11
12 Councilmember Denis,
13 Yes.

14
15 Clerk,
16 Ms. Floreen.

17
18 Councilmember Floreen,
19 Yes.

20
21 Clerk,
22 Mr. Subin.

23
24 Councilmember Subin,
25 Yes.

26
27 Clerk,
28 Mr. Silverman.

29
30 Councilmember Silverman,
31 Yes.

32
33 Clerk,
34 Mr. Andrews.

35
36 Councilmember Andrews,
37 Yes.

38
39 Clerk,
40 Ms. Praisner.

41
42 Councilmember Praisner,
43 Yes.

44
45 Clerk,
46 Mr. Leventhal.



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Council President Leventhal,

Yes. The Sectional Map Amendment is approved by a vote of 7-0. We now have before us the Hearing Examiner's report and recommendation on application -- what we're going to do on this one is this. On Application G-842, we had a straw vote last week at which Councilmembers expressed views. Mr. Knapp is unavoidably absent this morning to attend a funeral. So we can have discussion now. We will schedule the vote on this matter at the conclusion of the public hearing this afternoon, which should occur at roughly 2:00pm. Are there Councilmembers who wish to speak to this matter now? Mr. Denis.

Councilmember Denis.

Mr. President, I respectfully suggest that we should have the argument when all members are here who plan to vote. Because things that might be said could affect the vote, influence a vote one way or another.

Council President Leventhal,

We can certainly do that. Does Mr. Denis anticipate lengthy argument on this?

Councilmember Denis,

Not lengthy, but, I think, we're basically talking to each other, at this point, trying to convince each other to change a vote, or to retain a vote. So, I think, I respectfully would suggest, and I certainly will abide by the chair's ruling, but that all members be present who intend to vote on the matter.

Council President Leventhal,

That's fine. I have no objection to Mr. Denis's suggestion. We can just move Item D to the conclusion of the public hearings this afternoon. Item 7D, if that's acceptable to all members, then we will proceed in that manner. I apologize to community members who have been here for this item. And we will take it up later this afternoon. We now turn to Item 8, which is the consideration of the Hearing Examiner's report and recommendation on oral argument on Application #G-841, regarding Shady Grove Investors I, and Shady Grove Investors II. We have a report from the Hearing Examiner?

Jeff Zyontz,

Generally, I believe your practice has been to take oral argument first, and then allow the Hearing Examiner any questions that you might have. In this case, the applicant has 20 minutes, under your general guidelines, to present whatever. So far as I know, nobody has signed up, or indicated me opposition. So there's no sense of a rebuttal, here, as far as I know. The Hearing Examiner is here and capable of answering the council's questions.

Council President Leventhal,

Okay. Mr. Wallace, you're here. And you have 20 minutes.



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1 Scott Wallace,

2 Yes. Thank you. For the record, my name is Scott Wallace.

3
4 Councilmember Praisner,

5 Scott, why don't you wait until Barbara...we have everything distributed.

6
7 Scott Wallace,

8 Sure, that's fine.

9
10 Council President Leventhal,

11 Okay, Mr. Wallace, please proceed. You have 20 minutes.

12
13 Scott Wallace,

14 Thank you. For the record, my name is Scott Wallace with the law firm of Linnowes and
15 Blocher here on behalf of the applicants Shady Grove Associates I and II.

16 Representatives of Shady Grove are with us today, as well as Barbara Sears from our
17 office. This application is a statement case for you, an opportunity for this Council to
18 make it clear that we can bring affordable housing to the County and promote the
19 efficient and smart development of commercial centers. And I believe that given the
20 support of this project, in this application, by the Planning Board and by technical staff,
21 and the Hearing Examiner's support for the merits of the project, the Council has clear
22 and legally valid basis to approve this application. Therefore, while we understand the
23 Hearing Examiner has raised a legal issue, and I will address that shortly, the Council
24 should not look at this issue in a vacuum outside of the project that is proposed in the
25 application. And what you have before you is a PowerPoint from the record of the
26 hearing, which provides on the first three sheets of both the site context and the location
27 of the property. The property is the undeveloped portion of the Shady Grove Executive
28 Center located at the intersection of Research Boulevard and Shady Grove Road. The
29 property has preliminary and site plan approval for about 925,000 square feet of general
30 office space and a 135-unit hotel. To date, about 700,000 square feet of office space
31 has been constructed and six buildings on the property in addition to the hotel. Under
32 current preliminary and site plans, the property is approved for an additional 200,000
33 square feet of general office development. This application, instead, proposes
34 residential development of the property with approximately 371 units and approximately
35 57 MPDUs to help meet the growing need for housing, and particularly, the housing for
36 employees of the surrounding employment centers and biotech and research and
37 development facilities in the Shady Grove Area. It is crucial for the Council to
38 understand that the applicants could apply for a building permit tomorrow for office
39 development on this property. Office development will not result in any MPDUs and will
40 generate twice the traffic that the residential project will generate. Based on the
41 evidence of record, the Planning Board, planning staff, and the Hearing Examiner found
42 the application and the project met all design goals of PD Zone, and several objectives
43 of the Shady Grove Master Plan, the county's housing policy, the county's general plan,
44 and the Planning Board's corridors and boulevards study. I repeat, the Hearing
45 Examiner specifically found that the project not only meets the design objectives of the
46 PD Zone, but also the current planning objectives and vision for the Shady Grove



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1 Planning Area. Finally, there has been no opposition to the application by any resident,
2 or civic association, in the vicinity of the property. The Hearing Examiner's
3 recommendation for denial is based solely on her finding that the application is not in
4 substantial compliance with the property-specific recommendations of the Shady Grove
5 Master Plan. At the same time, she admits that the question of substantial compliance is
6 a close one in this case, and arguments can be made in both directions. We believe, as
7 approved by the Planning Board and staff, the record is in fact clear that the application
8 is in substantial compliance with the master plan. As the Hearing Examiner notes, the
9 specific expectations of the time the master plan was approved in 1990 were that the
10 site would be built out for office uses. Therefore, when considering this application for
11 an alternative use, the master plan is not useful with regard to the property-specific
12 recommendations for the property. It is established in other county Council decisions, in
13 other rezoning cases, where there is a change in the assumptions of the master plan,
14 the Council will look more broadly at the master plan objectives for the planning area,
15 and other county policies, as well as the particular public benefits of the project
16 contemplated in the rezoning. Unless you truly want to turn the master plan into a
17 straitjacket and not a guide and prevent, not only this project, with its significant smart
18 growth and affordable housing component from going forward, but also other desirable
19 projects that propose a use, other than the use anticipated in an older master plans, you
20 must look towards the more general master plan recommendations, as well as other
21 current, pertinent county policies. Further, it's important for the Council to understand
22 that neither the PD Zone, nor Section 59-D-1.6 for development plans require a specific
23 recommendation for the PD Zone, or for residential zoning in the applicable master plan
24 for reclassifications of the PD Zone. Instead, required findings are of substantial
25 compliance with the density and use recommendations in the master plan and finding
26 that the rezoning will implement, not only the applicable master plan, but other pertinent
27 county policies. The Hearing Examiner states that substantial compliance requires that
28 the development proposal comply with the essential recommendations and objectives of
29 a master plan. What I have also handed out, to have as a handy guide, is a Shady
30 Grove Master Plan and excerpts from the first four pages of the master plan. In
31 particular, the project complies with the essential recommendations and objectives of
32 the master plan, which include to provide, as much as possible, the opportunity for
33 people to live and work in the same community, and encourage a mix of housing types
34 within the R&D Village. That's page one of the master plan, the plan summary.
35 Increasing the county's total housing stock in currently providing an appropriate mix of
36 affordable housing. The third bullet on page three of the master plan, orient higher
37 intensity uses near transit stops. That's the first and fourth bullets of the Land Use
38 Objectives on page four of the master plan. Encouraging a mix of uses. Second bullet,
39 Land Use Objectives, page four. This is the essence of the Shady Grove Master Plan. It
40 is absolutely clear that this master plan's essential objectives are furthered by this
41 project, which provides a significant residential density, adjacent to an employment
42 center, within walking distance of current and future transit, with a high affordability
43 component. This is the essence of the master plan's vision for the planning area. It is
44 also important for the Council to understand that a plain language reading of the
45 applicable provisions of the zoning ordinance does not support the Hearing Examiner's
46 conclusion. The master plan reconfirms the C-2 zoning of the property, which permits



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1 dwellings as a special exception use with a base residential density of six units per acre.
2 Special exceptions under Maryland law are deemed to be permitted uses, subject to
3 specific standards of approval. When the Council added the special exception for multi-
4 family uses in commercial zones in 1994, the intent was to encourage residential use as
5 an alternative use in commercial and industrial zones. The Planning Board and planning
6 staff in this application properly found that by reconfirming the C-2 zoning for the
7 property, which allows, as I noted, dwellings as a special exception use at a density of
8 six units per acre, the master plan shows the property for a density of more than two
9 dwelling units per acre, as required for application of the PD Zone. Significantly, floating
10 zones, such as the PD Zone and special exceptions, are legislatively predetermined to
11 be appropriate with the statutory standards of the zone or the special exception are met.
12 By allowing multi-family dwellings as special exceptions in the C-2 zone, the Council
13 has determined that multi-family dwellings are an appropriate use in the C-2 zone. It
14 must follow, then, that the master plan, in reconfirming the C-2 zone for the property,
15 provides a use recommendation that anticipates multi-family use of the property, as
16 proposed in this application. You cannot say multi-family is okay in one context, that of
17 the special exception, and not in the context of the PD Zone. To do so would create an
18 unnecessary and illegal conflict between two county laws. Further, the Planning Board
19 and staff properly found the maximum FAR permitted in the C-2 zone of 1.5 FAT
20 provided the appropriate guidance for determining whether the application before you
21 was in substantial compliance with the density recommendations for the property in the
22 master plan. The application proposes a maximum FAR of 1.5. And the Planning Board
23 and staff determined the density of the project proposed in the application is in
24 substantial compliance with the master plan recommendations, reconfirming the C-2
25 zone for the property. The Planning Board made its findings regarding the application,
26 after a thorough analysis of the issue at the board's public hearing on the application on
27 May 18, 2006. A transcript of the relevant portions of the board's discussion on this
28 issue is attached as Exhibit One to our request for reconsideration. It was cited to by the
29 Hearing Examiner last week when our request for oral argument was granted. The
30 planning staff also noted, in its report to the board, that the county attorney's office
31 confirmed that the provisions for residential development in the C-2 zone satisfied the
32 requirements of the zoning ordinance to allow reclassification of the property to the PD
33 zone. It is also important for the Council to understand that to deny the application
34 based on the Hearing Examiner's recommendations would be contrary to recent
35 precedent established by this council. By Resolution 15-239, approved on June 24,
36 2003, for Local Map Amendment G-803, the District Council approved the rezoning of
37 PD-9 to C-1, convenience commercial zoned land, in only land that was not
38 recommended in the Olney master plan for residential use. The Olney master plan, in
39 that case, reconfirmed the commercial zoning of the property. Further, the Hearing
40 Examiner, in her report and recommendation on LMA G-803, found that although the
41 master plan did not specifically recommend residential zoning for the C-1 section of the
42 property, the LMA met the use and density requirements of the only master plan based
43 on the general recommendations of the Olney master plan, as well as the general
44 county policies to promote additional housing opportunities. Finally, the Hearing
45 Examiner, in that case, found that in terms of density the C-1 zone was "more
46 analogous to moderate-and high-residential use than to low-density residential use of



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1 less than two dwelling units per acre." The excerpts from the Hearing Examiner's report
2 are also attached to our request for reconsideration. The District Council specifically
3 adopted the Hearing Examiner's analysis, and found the LMA G-803 met all the
4 requirements of the PD zone, even without a specific recommendation for residential
5 use of that property in the only master plan. As a result, 100 units of affordable senior
6 housing were built in Olney. We urge the Council to follow that precedent in this
7 application. In summary, the Hearing Examiner's recommendation for denial is based
8 on an erroneous interpretation of the zoning ordinance that is not supported by planning
9 staff, or the Planning Board, is contrary to prior Council decisions. The Council can
10 accept her finding. And in doing so, ignore precedent, frustrate its own stated housing
11 and planning goals, and lose out on another opportunity to provide affordable housing.
12 Instead, we ask the Council to adopt the recommendations of the Planning Board and
13 planning staff. And approve this project as a clear statement of the Council's
14 commitment to increasing housing opportunities for future county residents. Thank you.

15
16 Council President Leventhal,
17 Mr. Subin.

18
19 Councilmember Subin,
20 I'm not sure if this is the time for questions. If it would be afterwards, that's fine. But I
21 really have some questions for the Hearing Examiner.

22
23 Council President Leventhal,
24 Okay. Does the Hearing Examiner want to respond to the applicant?

25
26 Francoise Carrier,
27 I'm not sure that it's appropriate for me to do so outside of context of Council questions.
28 I'm happy to answer questions. But I don't really have a role in the oral argument
29 process, per se.

30
31 Council President Leventhal,
32 Okay. Well, then, let us entertain questions from Councilmembers. Mr. Subin.

33
34 Councilmember Subin,
35 Thank you, Mr. President. Outside of some of the benefits of this proposal -- I am
36 troubled by -- this is the second application in a row that we have received from the
37 Hearing Examiner in which the issue of additional MPDUs appears to be taking second
38 place, after both the planning staff and the Planning Board had recommended approval
39 of both proposals. I'm troubled that there is a trend here.

40
41 Francoise Carrier,
42 Well, I can tell you the Hearing Examiner's office does not take policy positions. We are
43 not a policy making body. We perform a legal function. And we summarize the
44 evidence. We take the evidence, and we come to legal conclusions based on our
45 analysis of the facts and the law as it is written. Whether it involves MPDUs or not is
46 completely immaterial to us. We are just simply not policy makers. The Council can take



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1 whatever policy position it chooses to. But the Hearing Examiner's office -- we're not
2 taking positions based on policy. As I said in my report, there are many favorable
3 aspects to this proposed development. But in my view, from a legal perspective, I
4 believe that my duty, at least, is to inform the Council that I believe the most sound
5 interpretation of the PD Zone Requirements is that there should be a recommendation
6 for residential use in the master plan. If that mean it stops a good development, I regret
7 the outcome. But I cannot advise the Council to take what I believe to be an erroneous
8 legal interpretation for policy reasons. It's just not my job to do that.

9
10 Councilmember Subin,

11 Is the master plan a legal document? What legal standing and binding does a master
12 plan have?

13
14 Francoise Carrier,

15 Well, there are several opportunities for different interpretations from the one that I took.
16 And one of those is with regard to the master plan. The first question -- there's a legal
17 issue, which is whether the PD zone requires a residential recommendation. If it does,
18 then the first question for the Council is whether the master plan, in this case, can be
19 construed to have recommended residential use of this property. In my view, it doesn't
20 have that recommendation. There are certainly arguments to be made that you could
21 interpret the master plan differently. You, as the Council, could choose to follow Mr.
22 Wallace's advice and interpret the master plan and consider the property-specific
23 recommendations of the master plan to be less important than the overall objectives. In
24 my view, this master plan set aside some areas for employment, some areas for
25 residential, some areas for mixed employment and residential. This particular property
26 was squarely in the employment category, because that was the expectation at the
27 time. However, there are certainly objectives in the master plan that this project would
28 serve. And the Planning Board, clearly, is of the view that it would be good to have this
29 project go forward. They choose to construe the master plan in a different way. They
30 chose to look at the general objectives. In my view, the findings that the Council has to
31 make for a case that requires a development plan, you have to have substantial
32 compliance with the use and density indicated in the master plan. I simply couldn't find
33 that in this master plan with this record.

34
35 Councilmember Subin,

36 With all due respect to Mr. Wallace, he, unfortunately, is here and will be the example.
37 I'm making a generic argument. His recommendations, that he's propounding here, are
38 the desires of his clients.

39
40 Francoise Carrier,

41 That's his job.

42
43 Councilmember Subin,

44 And his clients' interests are very narrow, whereas the interests of the Council are much
45 broader. At times they'll differ. At times they'll be similar. The master plan is guidance
46 and it's guidance -- I'm going to make an argument now that's not self-serving, because



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1 if folks want to take the very legalistic view that I'm hearing, then y'all are going to be
2 tied up for days at a time over the next couple of years on these denials. But a master
3 plan is guidance. And its guidance set forth at a time certain under then existing
4 conditions and then known forecasts, which get shadowier [sic] and shadowier [sic] as
5 the days go by. What is being overlooked in a rigid legalistic argument, and I will
6 concede to you that your arguments are consistent, if you're going to take a legalistic
7 argument, then, yes, the approach you are taking, and the recommendation that's here,
8 makes absolute sense. But I don't believe that a master plan was ever meant to be a
9 forever thing. It is a council's policy, set down under certain circumstances, with certain
10 views, at a certain time. As time passes, conditions and policies are going to change.
11 And in this case, it seems to me that the request before us is very consistent with where
12 this Council has been moving. And clearly where I hear that the next Council will be
13 going. It's in several areas. One, MPDUs and affordable housing. This puts MPDUs and
14 affordable housing in an area where there are none. If you look right across the street,
15 while it's in a different jurisdiction under which we have little to no control, you're going
16 to see a large amount of housing, only a small amount of which will be affordable. This
17 proposal puts affordable housing in an area that can withstand little additional traffic,
18 which the recommendation in the master plan would do. It puts folks in an area where
19 they can walk to work. They're not even going to need public transit. And for those who
20 need public transit, they are very close to bus lines that take them very close to metro.
21 And within walking distance of the proposed property, you have a hospital that is
22 expanding, that has a lot of nurses and a workforce that needs affordable housing. And
23 so even laying aside the property owner's interest, which has been very well
24 propounded by Mr. Wallace, we're looking at something that I would say if we had been
25 doing this master plan over now, and this proposal were put before us, even absent the
26 property owners here now, that this is clearly something at a minimum, I think, the
27 Council would have strongly considered. And I would give it a far more than even
28 chance that the Council would have put in the master plan. For when this master plan
29 was put into place there is -- I'm not going to say no way that the then Council would
30 have seen this, or envisioned this need, but that's why we have the processes that we
31 do. To take in those considerations when the time is right to look at a piece of property.
32 So I would argue even if one looks at the purely legalistic framework, that the framework
33 is there to take into consideration what is before us. And to look at what the current
34 policies are. And to consider whether the proposal, whether it is this one or any other
35 one, I'm beyond even this proposal right now. It's closely linked to the policies and
36 furthers the public's interest. And it's clear to me that this one, from an affordable
37 housing standpoint, from the standpoint of putting in residential instead of jobs to cut
38 down on the traffic -- and while I'm not sure that overall that that is a policy that I would
39 be pursuing on a macro basis -- certainly, here it works. It works like a charm. If any
40 place is ripe for that change in policy, in the switch from jobs to residential, for all the
41 reasons that have been expounded by counsel, this is it. It will be affordable housing,
42 the transit, the proximity to jobs, and the proximity to jobs in a large job place within
43 walking distance where the work force is sorely in need of affordable housing. I mean,
44 this is it. I, respectfully, disagree with the learned Hearing Examiner that the legalistic
45 issue here should be the predominant one. I'm not saying that laws should be
46 overlooked. I'm just saying that the master plan is advisory. And that there is a legal



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1 process that has been put in place to take into considerations the changes that are
2 before us. And, again, if there is any place that is ripe for this kind of proposal and this
3 kind of change, this is it. I'm not sure I know of any other place in the county that is riper
4 for this. So at the appropriate time Mr. President, which I know is not at the moment, I
5 will move for approval of the application.

6
7 Council President Leventhal,

8 Okay. Thank you, Mr. Subin. As last week, if the Council should decide to act today on
9 a recommendation other than the Hearing Examiner's recommendation, we will be able
10 to do so today, only as a straw vote, because the resolution before us is drafted
11 according to the Hearing Examiner's recommendation. Mrs. Praisner.

12
13 Councilmember Praisner,

14 I actually have a series of questions I'd like to ask both the Hearing Examiner and Mr.
15 Wallace. Mr. Wallace, you talk about an old master plan. How old is old before you
16 should set aside, perhaps, the language of the master plan, in your view?

17
18 Scott Wallace,

19 I think, first of all, it's important to understand that in 1990, when the master plan was
20 drafted, this site was under development as an office park. So, this wasn't a green field
21 where there were a lot of options that were really before the council. It was really
22 [thought] it would be developed out that way. It is 16 years old. It is not setting aside
23 those recommendations as much as those recommendations, property specific, are just
24 not very useful to guide this council. This master plan did recognize the future need for
25 housing, in many other areas. And that's what we can fulfill today. I believe this master
26 plan, in the next few years, is scheduled for revision.

27
28 Councilmember Praisner,

29 So, from your perspective, there is a specific date, or it is the context in which -- I'm
30 trying understand if you are suggesting there's a time to it, or that the language doesn't
31 suit the period that you're now in. What are the suggested -- what are you suggesting
32 when you say the plan is old? Should we have a date by which we say well a plan past
33 a certain time period, so therefore, we should not pay it the same kind of deference that
34 we should something more recently done?

35
36 Scott Wallace,

37 I didn't go planning school, but I think you will find most planning schools will say 10
38 years or so. Most master plans should be revised.

39
40 Councilmember Praisner,

41 But, we keep master plans with an assumption of 20 years. So, how does that...?

42
43 Scott Wallace,

44 Of course, there's not pull-out date for master plans. It is really a context. And it really
45 gets to the straight jacket versus guide. There's a reason the master plan is not a



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1 straight jacket. If it was, it would limit this council's ability to bring good projects forward,
2 especially where you don't have a very useful, specific property recommendation.

3
4 Councilmember Praisner,

5 Is it that the whole master plan, itself, should not be a straight jacket? Or that there is
6 the fact this property was not site specific, or didn't have more detail within the master
7 plan, because of the fact that activity was going on, as you say? I'm struggling with the
8 fact that you could make an argument, if you take the guide argument, that tomorrow
9 you can change something we adopted today, because it's only a guide. And so, the
10 age is not the issue, it's the use. You seem to be making two arguments. And I have
11 another question. But I'm struggling with the point that...and everyone, obviously, is
12 going to use whatever arguments they think are best for their case. But, since this
13 master plan is 16 years old, you can say it's old. But it may have specific language
14 related to a parcel, which mean that it's more prescriptive, and it isn't a guide. There
15 was some hard fast policy and philosophy. You make the point there was already
16 activity for an office park, so perhaps, the thought process for this parcel was not a
17 deliberate one beyond the slam dunk office park, office park. Is that what you're
18 suggesting?

19
20 Scott Wallace,

21 I think that I am suggesting that as you move forward on a master plan, as it ages, you
22 are more likely to get cases where it doesn't work anymore. The property-specific
23 recommendations don't provide you the guidance you need. Again, it wasn't a green
24 field that there were several options studied. And, I'm not sure that in 1990 anyone
25 would have put residential in the middle of an office park. It simply wasn't the radar
26 screen of planning at that time. And really what the Hearing Examiner is saying is, "This
27 master plan says this use should go there, and that use should go there."

28
29 Councilmember Praisner,

30 If a master plan had said that the primary purpose for areas is to add jobs, and this area
31 needs jobs: would you then come back with an argument that mixed-use development
32 is now hot, and residential development is hot and we can do this for you as well, so
33 never mind that the master plan says the primary purpose is to add jobs?

34
35 Scott Wallace,

36 I'd suggest that for every job you add, you would need a housing unit.

37
38 Councilmember Praisner,

39 The master plan, obviously, is in balance on that issue of jobs and housing in most
40 cases, or at least has made assumptions about jobs and housing. And there may be
41 other master plans that provide those housing for those jobs. In other words, my point is
42 you might have a philosophy that says in a plan, and you pointed to the philosophy in
43 the Shady Grove Plan, that says all of these things. And you point to them and they're
44 very legitimate as to the overarching policy. But suppose a master plan said,
45 specifically, that the goal is more jobs. Should that be ignored?



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1 Scott Wallace,

2 It shouldn't be ignored. I'm saying that if the master plan in 1990 was looking for
3 opportunities for housing sites, it wouldn't have looked at this property, because it would
4 have been built out.

5
6 Councilmember Praisner,

7 Okay. Right. But if it were looking for jobsites, it might have looked for this one. And if
8 jobs were a priority. I'm struck by the argument that a precedent has been set by the
9 one 2003 action on some senior housing that could have been approved through
10 special exception issues are associated with senior housing as well. But my question is,
11 are you suggesting that having done something, that if you then identify that there was a
12 flaw there, you have to continue to do it because you did it once?

13
14 Scott Wallace,

15 No. I'm suggesting that if you haven't established precedent, then you should have clear
16 and convincing evidence that that precedent is wrong before you overturn it. And I think
17 the Hearing Examiner, even in her own report, says this is not clear and convincing. It's
18 a close call on these issues.

19
20 Councilmember Praisner,

21 Francoise, the issue of the Olney decision is referred to both by Mr. Wallace and by
22 you. Can you explain your thought process in reviewing that? And your assumptions
23 about the use of, or that action, as far as its applicability here?

24
25 Francoise Carrier,

26 Sure. The decision in G-803, Mr. Wallace described it fairly accurately. Although, it
27 differed from this one in some respects. For one thing, the property was partly zoned
28 and recommended for residential use, about a third of it. And two-thirds was
29 recommended for commercial use. And the master plan...I went back and reread my
30 report and looked at the Olney Master Plan and the use that was proposed in that case
31 fit more closely the master plan than the use proposed here does. So, in that case, I
32 found that there was substantial compliance with the use and density of the master
33 plan. And the thing that I did, particularly, in that case that I now think was a mistake,
34 was I didn't look carefully enough at the standards and regulations of the PD zone. One
35 of them is 59C7.121, which says the master plan must show land for a density of two
36 dwelling units per acre or higher. And in the current case, the issue of the applicability of
37 that particular standard was discussed. It was raised in the technical staff report. The
38 Planning Board discussed it. There was an argument submitted on behalf of another
39 landowner. So it was very much discussed. And it caused me to focus more closely on
40 the PD zone as a whole and that provision. I noticed, I think, more closely that it calls for
41 two dwelling units per acre or higher. In G-803, three years ago, I analogized between
42 the density of the sort of general sense of intensity of use in the commercial zone that
43 was an issue in that case, which I think was C-1? Intensity one? And sort of said well it's
44 at least as intense as two dwelling units per acre or higher. I now think that that was not
45 a legitimate way to look at it. The zoning ordinance, specifically, freezes it, in terms of
46 dwelling units, which is a different measure of density than the kind of density terms we



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1 use in commercial zones where we look at floor area ratio, FAR. I also was struck, this
2 time around, by another one of the standards of the PD zone, which is 59C7.14C. And
3 that section discusses the appropriate density for a PD zone development. And it says
4 "density of development is based on the area shown for residential use on the master
5 plan." And that language, to me, is a strong indication that the zone is only intended to
6 be used in an area that's shown for residential use on the master plan. I found that to
7 be, as I said, a persuasive element in interpreting this zone.

8
9 Councilmember Praisner,

10 So, your point, then, is that the PD zone requirements that the Council must use for
11 making a determination that it's appropriate to rezone to a PD zone are not met by this
12 application. And your argument, Mr. Wallace, is the subsequent action by the Council
13 to make residential use in a C-2 zone acceptable is justification for saying that a PD
14 zone -- that the Council felt that a residential is okay here, because we said any C-2
15 zone can carry a residential use?

16
17 Scott Wallace,

18 Correct. I don't go past 1994 when the Council adopted this special exception. I believe
19 that prior to 1990 there was also residential use permitted in the C-2 zone. But definitely
20 in 1990, I acknowledge that there wasn't. But, subsequently, the Council did, by special
21 exception, allow dwellings, multi-family, six units per acre in the C-2 zone, up to two
22 units per acre with affordable housing. So, this C-2 zone can support, in the council's
23 eyes, multi-family development.

24
25 Councilmember Praisner,

26 And your answer to that, Francoise?

27
28 Francoise Carrier,

29 I'm sorry. I got distracted, because I was thinking that I wanted to go back --

30
31 Councilmember Praisner,

32 The point that the C-2 zone actions by the Council automatically makes this parcel,
33 since it's zone C-2, eligible for residential dwelling units, thereby satisfying the PD
34 requirement for the master plan to say residential.

35
36 Francoise Carrier,

37 Right. It's another area where there is room for interpretation. In my view, the master
38 plan -- at the time the master plan was adopted, the C-2 zone did not permit the
39 dwellings special exception. So the drafters of the master plan, and the council, and the
40 Planning Board in adopting and approving it, did not contemplate that applying the C-2
41 zone to a piece of land, or recommending it in the master plan, had within it the
42 possibility of residential use. So, in my view, if we're looking at what the master plan
43 recommended, a subsequent legislative action is not relevant. That's an interpretation
44 question for the Council to make. If the special exception has been permitted, in the C-2
45 zone when the master plan was adopted, I think there would be a stronger argument
46 that the C-2 zone included the possibility of residential. And so, you could interpret the



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1 master plan more broadly. To say, well the recommended C-2, which is mostly for office
2 use, but it, in fact, includes this residential special exception. It does raise the question
3 of density. If the Council should decide that this development substantially complies with
4 the use recommended in the master plan based on the existence of this dwelling special
5 exception, and based on the general objectives of the master plan, the next question is
6 whether it substantially complies with the density recommended in the master plan. I
7 find that to be problematic, because the dwelling special exception allows, as a right, six
8 units per acre.

9
10 Councilmember Praisner,

11 So, that's certainly not the number. Is that what you're saying?

12
13 Francoise Carrier,

14 Which is vastly less than the 56 units per acre that is being requested in this application.
15 There is the possibility of 21.5 units per acre under the dwelling special exception, if you
16 have 35 percent productivity housing, which this application is not proposing. The other
17 element to consider in that, regarding the density, is that if you look at the master plan
18 where it did recommend residential uses, the highest density it recommended anywhere
19 in this area was 20 to 25 units per acre, which is half what the applicant is requesting to
20 put in. So, I find it difficult to make a finding that this development would substantially
21 comply with the density recommended in the master plan, even if you use the dwelling
22 special exception. But before I forget, you had raised the question earlier with Mr.
23 Wallace about whether you have to stick to something if you feel it was previously a
24 mistake. And I think on that law, you do not have to stick with it. Mr. Wallace cited a few
25 cases in his oral argument. And three of the four cases were cases where a legislative
26 body approved a particular plan, and then either there was a change in composition of
27 that legislative body, or there was some other event, and so they were called on to
28 reconsider it. And they changed their mind. It was exactly the same plan. They
29 approved it one day, and they denied it a few months later. That's not the situation we're
30 in. This is a totally different plan. It's a different set of facts. Mr. Wallace also cited a
31 case that's quite well-known, Aspen Hill Ventures Case. And in that case, the Council
32 denied a request to rezoning based solely on a finding that there wasn't a need for
33 commercial uses in the area. Four months later, they approved commercial rezoning
34 1,500 feet away. And the court took this to be evidence that the denial was arbitrary and
35 capricious. I don't think the Council is in any danger of that in this instance, either. We're
36 in totally different parts of the county, totally different uses. I believe if the Council
37 decides that a legal interpretation it once applied is wrong, it's not obligated to apply that
38 again, as long as it has substantial probing evidence before it to support whatever
39 decision it's going to make in the new case.

40
41 Councilmember Praisner,

42 So, it seems, to me, the issue is, as you said, a close call. And the question is where
43 you put your emphasis from a standpoint of assumptions about the master plan, but
44 also requirements of the PD zone. And that might suggest a review of the PD zone
45 language. But given the language that exists now, your conclusion is that you felt you
46 were required to recommend denial given the language of the PD zone. And, Mr.



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Wallace, your argument is that you don't see the slam dunk from that interpretation of the PD zone, but even if you did, the public policy "the ends justify the means".

Scott Wallace,

I think you have to look at what your ends are. You have a C-2 zone, which clearly permits multi-family development, whether it's 22 units per acre, or 21.5, or 44, it clearly envisions multi-family in relative- to high-density. Whether you have an office building at 1.5 FAR, or a residential building that's limited to 1.5 FAR, you're still going to get 400,000 square feet of building with half the traffic with residential.

Councilmember Praisner,

That's another debatable issue. But, I'm just trying to understand. I actually do not subscribe to the automatic assumption that just because you put residential closer to development, closer to commercial, that you're automatically going to have people walking and not putting the same kind of intensity. I know that's not part of the record issue, but I think it's a -- there are lots of examples one way or the other, but the reality is when you're doing commercial development the way we calculate the activity is based on an assumption that every square foot is occupied by a certain number of people. And that is not necessarily likely to occur at the same intensity and same immediacy as the residential occupancy is, so, I think that's an issue that needs to be further explored. But, certainly, that's the vernacular of the time to argue that adding residential close to commercial is automatically going to be fewer trips. Because folks are going to walk, or work, right next to where they live. That is an interesting issue that I think we have to -- the jury is actual out on. But your overall argument relates from the PD perspective to the fact that the relevance to the master plan, you can find language for, and the action on the C-2 zone justifies a residential use, because we've already said automatically it's possible.

Scott Wallace,
Correct.

Councilmember Praisner,

The question of density, I think, you've responded to as well. Those are my questions. Thank you.

Council President Leventhal,

Mr. Andrews is next. That would mean Ms. Floreen is next.

Councilmember Floreen,

Thank you. Ms. Carrier, what's the zoning around this project? As I understand it, the proposal is to plunk a PD project in the middle of an office park. Is that a fair statement?

Francoise Carrier,

Correct. I expect the applicant wouldn't like the word "plunk" very much, but that is --

Councilmember Floreen,



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Carefully insert.

Scott Wallace,
Development.

Francoise Carrier,
But you are correct. There is no PD zoning very nearby.

Councilmember Floreen,
And the office park is zoned...?

Francoise Carrier,
The office park is C-2. It may have a little bit of OM, but I think it's actually all C-2.

Councilmember Floreen,
So, that was underway when the plan was initiated previously.

Francoise Carrier,
I understand the preliminary plan had been approved on the site plan. I don't believe construction had actually begun.

Councilmember Floreen,
For the whole area?

Francoise Carrier,
For that office part.

Councilmember Floreen,
This piece, was that included in that previous park?

Scott Wallace,
Yes. It's part of the office park.

Councilmember Floreen,
So the assumption was it was going to proceed.

Scott Wallace.
Yeah. We believe it was under construction.

Councilmember Floreen,
The park itself? Probably. That's probably why the master plan didn't -- as I understand it, the master plan was silent.

Francoise Carrier,
Well, it actually showed it as...on all the maps, there was no text about this particular parcel. But they showed it on the maps as committed development, which was



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1 consistent with the fact that it had a preliminary plan that had been approved, and it was
2 going forward.

3
4 Councilmember Floreen,
5 So, the whole quadrant, or block, or however you would characterize it was shown as
6 C-2?

7
8 Francoise Carrier,
9 C-2 with a little sliver of OM.

10
11 Councilmember Floreen,
12 It just preserves the historical zoning there, and didn't think big thoughts about it.

13
14 Francoise Carrier,
15 Correct. There were areas where the master plan recommended PD, but not that
16 particular one.

17
18 Councilmember Floreen,
19 Sure. And quite likely because they thought, why bother? And the property owners, no
20 doubt, were doing their marketing and so forth, and were set in their ways.

21
22 Francoise Carrier,
23 Yes.

24
25 Councilmember Floreen,
26 This is an interesting case. We do have the advantage of more future thought. I don't
27 think anyone is thrilled with the office parks that we have permitted over time. The I-3
28 stuff, all this, a lot of green space, a lot of driving that's required, basically. We thought it
29 was creative at the time. It seems to me...and, Mr. Wallace, under your analysis, really,
30 the PD zone could go anywhere, right? If there's a special exception potential in any
31 piece of land for some residential use, it's thereby. There's some sort of base density
32 associated with it.

33
34 Scott Wallace,
35 Right.

36
37 Councilmember Floreen,
38 As a good lawyer, I would expect you to make a good argument.

39
40 Scott Wallace,
41 That's my request. Thank you.

42
43 Councilmember Floreen,
44 Right now, I guess, there are some to the extent that a special exception for an elderly
45 housing facility could be permitted in the Ag reserve. One could argue, if one were a
46 factual attorney, that there's a higher density than the current zoning. Because, under



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1 your theory, a special exception is presumably a density call in that area. If you were a
2 good attorney, wouldn't you make that argument?

3
4 Scott Wallace,

5 Yes, that's the use part of it. You probably run into problems with the density
6 recommendation part, because your underlying density and your Ag zone wouldn't
7 really permit the multi-family density.

8
9 Councilmember Floreen,

10 Where does residential density in the C-2 zone? The underlying density in the C-2
11 zone?

12
13 Scott Wallace,

14 The 1.5 FAR.

15
16 Councilmember Floreen,

17 Underlying residential density.

18
19 Scott Wallace,

20 No. That's the ——

21
22 Councilmember Floreen,

23 That's not underlying residential density.

24
25 Scott Wallace,

26 That's your office.

27
28 Councilmember Floreen,

29 Right.

30
31 Scott Wallace,

32 Right. But that's -- you wouldn't have that analogy.

33
34 Councilmember Floreen,

35 This is where you fall off the boat, it seems to me.

36
37 Scott Wallace,

38 Well, no, because you wouldn't have, in your Ag zone, you wouldn't have anything you
39 could convert to the residential to get any density out there. You wouldn't have an
40 underlying residential ——

41
42 Councilmember Floreen,

43 But, you'd have a special exception opportunity, which is, according to your analysis, is
44 presumed to be a legislative determination that works, right?

45
46 Scott Wallace,



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1 On your use, that residential use is appropriate.

2
3 Councilmember Floreen,

4 We're an assisted living facility with X number of units that you need to have to get ——

5
6 Scott Wallace,

7 Arguably, you would be limited to the same density as your underlying special
8 exceptions is the best analogy that I could draw on that case, in an Ag zone.

9
10 Councilmember Floreen,

11 Yeah.

12
13 Scott Wallace,

14 Different situation.

15
16 Councilmember Floreen,

17 And in other zones as R-60. Take R-60, or R-90, or R-200, special exception—

18
19 Scott Wallace,

20 R-200, you've got the underlying zoning. You'd be able to do that—

21
22 Councilmember Floreen,

23 But, that's presumed residential. But it's still restricted density. Your basic point, I think,
24 is that commercial density is translatable into residential density, right?

25
26 Scott Wallace,

27 Right. The Hearing Examiner sells herself short, to a degree, for the Olney Case,
28 because that was her point, that the analogy between commercial and residential can
29 be made.

30
31 Councilmember Floreen,

32 Yeah. And she's backed off that, now, apparently. But, that would be the point you're
33 making as well. That density is density in residential or commercial. It doesn't matter.

34
35 Scott Wallace,

36 The line of reasoning that the Planning Board really adopted, yeah.

37
38 Councilmember Floreen,

39 And the one that you're trying to adopt as true. Explain to me how you get over the PD
40 master plan language, which says, according to the Hearing Examiner on page 15 of
41 her report, "no land can be classified in the plan development zone unless such land is
42 within an area for which there is an existing duly adopted master plan, which shows
43 such land for a density of two dwelling units per acre or higher."

44
45 Scott Wallace,

46 Could you repeat what page that's on, Ms. Floreen?



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1
2 Councilmember Floreen,
3 It's R, Circle 50. Page 15 of the Hearing Examiner's Proposed Resolution. It's
4 59C7.121. I just can't get by that. Mr. Subin addresses the policy issue. I'm hung up on
5 the language of the code that says "no land can be classified," which is us. That's us.
6

7 Scott Wallace,
8 You're talking about your threshold issues.
9

10 Councilmember Floreen,
11 Our threshold technical problem, here.
12

13 Scott Wallace,
14 I think it's important to understand -- .
15

16 Councilmember Floreen,
17 No. Can you tell me the answer to how you, personally, get over that language?
18

19 Scott Wallace,
20 Professionally, I get over it this way. You have a master plan that recommends C-2.
21

22 Councilmember Floreen,
23 No. Tell me allow it says, "no land can be classified in the planned development zone
24 unless it's within an area for which there is a master plan that shows such land for a
25 density of two dwelling units per acre."
26

27 Scott Wallace,
28 This land is shown on the master plan for a zone that permits development at six units
29 per acre by special exception.
30

31 Councilmember Floreen,
32 Because of special exception.
33

34 Scott Wallace,
35 Right. A special exception that, as those who were on here in 1994, and I'm not going to
36 speak too much more, because I wasn't around, clearly know intent of that special
37 exception and what it was.
38

39 Councilmember Floreen,
40 You might have been staffed to the Planning Board then.
41

42 Scott Wallace,
43 Not quite yet. 1996.
44

45 Councilmember Floreen,



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1 So, that's your argument. A master plan shows such land for density of two dwelling
2 units per acre, if the zone has a special exception that could be applied in the pure
3 sense.

4
5 Scott Wallace.

6 In a pure sense. In a legal sense, your special exception is predetermined to be a
7 permitted use in that zone subject to the standards of the special exception. So you
8 have a zone, as a permitted use, dwellings six units per acre or higher, up to a 21.5
9 units per acre. That's a fairly plain language read of both -- .

10
11 Councilmember Floreen,
12 I don't think so, but it's your plain language.

13
14 Scott Wallace,
15 Yeah, it's plain to me.

16
17 Councilmember Floreen,
18 It's plain to you. So, that anywhere where a potential -- I mean, your fundamental
19 premise is if a special exception could be permitted, under some scenario, that's a
20 prima facie, a master plan recommendation for the same land, even though it didn't
21 discuss it.

22
23 Scott Wallace,
24 You're talking about your initial hurdle to get an application in.

25
26 Councilmember Floreen,
27 Yeah, kind of initial.

28
29 Scott Wallace,
30 But then you have to look at the reality. The reality is you're not going to get those types
31 of applications, because you're not going to be able to achieve the underlying density
32 that makes sense to do those projects.

33
34 Councilmember Floreen,
35 Well, that's a whole other issue, a policy issue.

36
37 Scott Wallace,
38 Right.

39
40 Councilmember Floreen,
41 You're basically arguing that the PD zone should be -- I don't even have an opinion
42 about the land use. It's really the PD zone issue. Is there another zone that could be --
43 the issue of a floating zone. Maybe you could talk a little bit about this, both of you. The
44 nature is that a floating zone can float around and can be brought down based upon
45 satisfaction of master plan objectives. Right? Isn't that the basic concept?



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1 Francoise Carrier,

2 Not just master plan, also compatibility and the purposes and standards of the zone.

3
4 Councilmember Floreen,

5 One must look at the actual language of the floating zone?

6
7 Francoise Carrier,

8 Correct. It's not master plan alone. You have to look at the purposes of the zone. Some
9 of the floating zones have actual standards that have to be satisfied. They're not as
10 strict as development standards, in the Euclidean zones, typically. But they do have
11 some standards.

12
13 Scott Wallace,

14 But they are in the nature of a special exception. In many ways, they are treated, from a
15 legal point of view, similarly as a special exception.

16
17 Councilmember Floreen,

18 That is certainly true. It is of the nature of a special exception. It has to satisfy some
19 fundamental issues. I guess the concern I have is your argument is that all commercial
20 land, then, is fundamentally translatable into PD zone...

21
22 Scott Wallace,

23 As your PD zone is written now, I believe that's the case.

24
25 Councilmember Floreen,

26 Because, technically, a special exception could be permitted.

27
28 Scott Wallace,

29 Technically, it is permitted in the table. It's a special exception use --

30
31 Councilmember Floreen,

32 Under a special exception, many of which are approved. And many of which are not.

33
34 Scott Wallace,

35 Just as the applications that would come before you under the PD zone could be
36 subject to your review ultimately.

37
38 Councilmember Floreen,

39 But the plan, itself, says nothing about this property. There's nothing in the text. And
40 there's nothing in the -- except to have presumed that the project was going to proceed.

41
42
43 Francoise Carrier,

44 There's one table that lists properties by...they have sort of a key to areas with numbers
45 that shows this. I'm in the column for Committed Development. But other than that, it's



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1 shown in all of the maps with commercial use and C-2 zoning. But there's no technical
2 discussion.

3
4 Councilmember Floreen,

5 Okay. Well, I think...I really think -- I am surprised that this was not addressed -- raised
6 down at the Planning Board. But I can see where they would have said this is a good
7 objective. And there is a fundamental frustration with a master plan process that takes
8 so long for it to be revisited in zones that aren't flexible. The PD zone is supposed to be
9 a mixed-use zone. But you're not proposing any mixed of uses.

10
11 Scott Wallace,

12 Unfortunately, we tried. We would have liked today have put some limited amount of
13 commercial in there. But, the way it's structured, we don't have enough units that we
14 can achieve to allow that commercial to be in there. We did look at that.

15
16 Francoise Carrier,

17 Generally, the commercial is advised in the PD zone only. If there are at least 500 units.
18 The concern is if you don't have a critical mass of residents, your commercial use,
19 ground-floor retail, will not be viable. You'll end up with an empty space that is an eye
20 sore, and they attract vagrants at night, or whatever.

21
22 Scott Wallace,

23 Well, uniquely, the office park brings its own commercial element to this site.

24
25 Councilmember Floreen,

26 Well, the area that surrounds this is kind of a classic building surrounded green space
27 office park. There's no connectivity proposed between...

28
29 Francoise Carrier,

30 And parking lots.

31
32 Councilmember Floreen,

33 Is there between the existing buildings and the new ones?

34
35 Scott Wallace,

36 Oh, absolutely. Absolutely.

37 This will be literally in the midst of office buildings.

38
39 Councilmember Floreen,

40 It will be in the midst, but it's not like it's going to be a neighborhood of coordinated
41 activity, is it?

42
43 Scott Wallace,

44 Actually, between the existing public pathways, which are really actually, the picture
45 show it well, and connect this area very well. Plus, you'll have shared amenity spaces
46 that will be used and border both the commercial lots and the office lots and the



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1 residential lots. This will be a well integrated. This was found by the Planning Board
2 staff, as well. A very well integrated project into this office park.

3
4 Councilmember Floreen,
5 Okay. Thank you.

6
7 Council President Leventhal,
8 Mr. Silverman.

9
10 Councilmember Silverman,
11 Thank you, Mr. President. Ms. Carrier, I'm trying to glean from some of your comments.
12 You think this is a good project.

13
14 Francoise Carrier,
15 Yep.

16
17 Councilmember Silverman,
18 You just think the way to go is to amend the master plan.

19
20 Francoise Carrier,
21 Yep.

22
23 Councilmember Silverman,
24 Okay.

25
26 Francoise Carrier,
27 I know that's frustrating, because it takes a long time. But, that's the way I think it's
28 written.

29
30 Councilmember Silverman,
31 I understand that. Let me address something that was raised and eluded to by Mrs.
32 Praisner. The traffic engineer report that's in here indicates that the project will generate
33 about half as much traffic. I did not find anything in the record that contravened that. Is
34 that correct?

35
36 Francoise Carrier,
37 That's correct.

38
39 Councilmember Silverman,
40 So before us, regardless of what our gut feelings might be, this is what we have before
41 us.

42
43 Francoise Carrier,
44 That's correct. The only evidence on traffic is that this would have much lower traffic
45 than the approved commercial.



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Councilmember Silverman,

Okay. All right. And going back to what, I think, seems to be the heart of your comments. I was looking at the staff report from the Planning Board, which is back at circles – well, where I was looking at, specifically, 140 through 143. If you – and I apologize. I was trying to follow what you were saying about G-803. Were you the Hearing Examiner?

Francoise Carrier,

I sure was.

Councilmember Silverman,

Okay. So, in effect, you're reversing your —

Francoise Carrier,

I am reversing myself. There's no question.

Councilmember Silverman,

Okay. But if you weren't reversing yourself, would you -- if you took the same position, now, as you did in G-803, would you then, therefore, agree with the Planning Board staff's analysis? Because it seems to be that what they are basically saying on Circle 142 and 143 is that the Council went ahead and made some changes after this master plan. And therefore, made a decision in G-803, but it isn't so much the precedent issue, at least what I read from the staff report, as it is that the reasoning that was found in G-803 provides a rationale for this Council to do what it did in G-803. You may have changed your mind, but it didn't mean this Council has to change its mind.

Francoise Carrier,

Right. That is certainly true. You're welcome to think I was right then and wrong now. I'm sorry to put you in that position.

Councilmember Silverman,

No, that's fine. I'm trying to sort of sort through some of what the problem is here and what the remedy is.

Francoise Carrier,

It's a little bit hard for me to isolate what I would -- how I would come out in this case, if I were to stick to my reasoning in G-803. Because the cases are sufficiently different that the G-803 reasoning doesn't cover everything here. It doesn't go to the density issue, for instance. The G-803 reasoning gets you past 7.121. It gets you past the two dwelling units per acre, because I did a little mental gymnastics and decided you could sort of translate the commercial density into the residential density. And, frankly, I was thinking of the impact. I expect that what I was thinking back then; although, I can't remember what I did last week, never mind what I was actually thinking in 2003. But what I think I probably thought is, based on my language, then, is that if the reason that there was at least two dwelling units per acre stipulation was to avoid the PD zone getting plunked



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1 down in the middle of the Ag reserve in a place that called for one dwelling unit per 25
2 acres. There was a minimum level of intensity of use.

3
4 Councilmember Silverman,

5 I don't mean to interrupt, but I can't imagine any circumstances under which a PD-44
6 zone would be dumped in the middle of the Ag reserve, since there's no way that
7 anybody could find that doing that would be remotely consistent with, or substantially in
8 compliance, or whatever term we want to use, with the overall concept of the agriculture
9 master plan. It's technically correct, but completely implausible.

10
11 Francoise Carrier,

12 I think that's probably right. I guess I was just looking at the why would they specify at
13 least two dwelling units per acre. It's a pretty low standard. Two dwelling units per acre
14 covers a lot of our zones. And so, I was looking to see -- I was just thinking about
15 intensity of use. And so, I was figured the C-1 is at least as intense as the R-200, so it
16 must be okay. But it doesn't get me past 59C7.14, which I don't know...yeah, it's not
17 quoted. That part of the language isn't quoted in the staff report.

18
19 Councilmember Silverman,

20 Where is it in your...?

21
22 Francoise Carrier,

23 No. I don't think the whole thing is quoted. Is it?

24
25 Councilmember Silverman,

26 I'm sorry. 7...

27
28 Francoise Carrier,

29 Oh, yes, you're right. You're right. Ms. Floreen is right. Circle 144, right next to where
30 we were.

31
32 Councilmember Silverman,

33 Density of Residential Development.

34
35 Francoise Carrier,

36 Yeah. "Density of development is based on the area shown for residential use on the
37 master plan." I don't think I said anything in G-803 that addressed that particular
38 language. That still troubles me, even if you use the G-803 reasoning for the provision
39 with the two dwelling units per acre, there's still this language in 7.14C, that I think is
40 troubling. And there's the issue of what density the master plan recommended for this
41 area compared to the density the applicant is proposing.

42
43 Councilmember Silverman,

44 So, Scott, what's your response to this language...we're looking at Circle 144. It's the
45 PD zone.



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1 Scott Wallace,
2 Right.

3
4 Councilmember Silverman,
5 Density of development is based on the area shown for residential use on the master
6 plan...

7
8 Scott Wallace,
9 I'm very familiar with it. I think it's -- again, you have a piece of property that the entire
10 property can be developed for residential uses on. So, to me, it's once you acknowledge
11 that you can do residential by special exception out here on the C-2 property, the entire
12 area qualifies that way. It's the hurdle that you barrel over.

13
14 Councilmember Silverman,
15 Okay. Thanks very much.

16
17 Council President Leventhal,
18 Okay. Mr. Andrews.

19
20 Councilmember Andrews,
21 Thank you Mr. President. Mr. Wallace you talked in your 20-minute presentation about
22 as argument for the proposal noting that it would have high affordability component.
23 Can you elaborate a bit on that?

24
25 Scott Wallace,
26 Sure. 371 units, 15 percent will be in MPDUs, which is about 57 units, if the full build-out
27 is achieved to 371. So, it exceeds the requirement under the county law. It also -- while
28 it does utilize some bonus density, most of the bonus density is assumed by the
29 MPDUs. Not all of the units that are achieved, but most of them. If I could...a little
30 further on that. I think you will also find just the nature of the project, its location and the
31 anticipated users, residents, and/or tenants, whatever it develops as, I think you will find
32 this to be affordable housing relative to other residential options in the area, in addition
33 to the MPDU component.

34
35 Councilmember Andrews,
36 I didn't see any specifics in the proposal about that. I would not agree that 15 percent
37 constitutes a high affordability component. It's what's required, or close to what's
38 required, a little bit higher than what's required under the MPDU law. But, the end result
39 is that you get 85 percent that may well not be affordable and that's the current model
40 for the MPDU program. And it has produced a number of units over the years, but is
41 producing a relatively small number in recent years. Essentially, what I hear the
42 difference in the arguments is the ends justify the means. Good end, bad means is what
43 I hear from the Hearing Examiner. And I want to be clear about what the options are
44 that one could use to address it. It's been discussed that the master plan could be
45 amended. It's my understanding that the PD zone, itself, could be amended. And if I



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1 heard right, there's an option, that maybe I was wrong, of the special exception. Is that
2 right as well?

3
4 Scott Wallace,

5 No. The special exception, while technically is available, it just doesn't yield the density.
6 I think if you reviewed your special exception for productivity housing, you'd agree with
7 that. Just doesn't make sense to convert office in that situation. Similarly, it doesn't
8 make sense, marketwise, to wait for Master Plan Amendments, or for the PD Zone
9 Amendment. Just to be blunt and realistic.

10
11 Councilmember Andrews,

12 Well, affordable housing has been used as a strong argument for many projects,
13 including this one. I would note that last summer, Councilmember Perez and I, went to
14 the Oakwood Apartments, which is just about a half mile down the street, to urge the
15 owners of the Oakwood Apartments, who were at that time considering converting the
16 157 affordable units that are there to market-rate units. And they agreed, after some
17 negotiation with The Housing Opportunities Commission, to keep those as affordable
18 units for another ten years. Just parenthetically, I think we need to put a lot more
19 emphasis than we are on keeping affordable units that are currently existing, because
20 we're losing ground given how many are being converted still to market-rate units. I
21 think that the issue, here, does come down to what Ms. Carrier has identified. And I
22 want the Hearing Examiner to look at the master plan and approach it in a legal way,
23 because I agree, that is her role. Certainly, the Council has more latitude than the
24 Hearing Examiner as policy makers. I don't want the Hearing Examiner making policy.
25 And I respect her interpretation of her...and I agree with her interpretation of her role,
26 and of the Hearing Examiner, in presenting recommendations that she believes are
27 legally defensible, or the strongest legal argument that she can make. And that if
28 challenged would stand up. So, I understand where she's coming from, and I agree that
29 that's what she should do. I think that the language, here, is pretty clear. That the
30 master plan didn't contemplate this type of project. And that the better approach would
31 be to go one of the other two routes, which is to either amend the master plan, or
32 amends the zoning itself. While affordable housing is rightly an important consideration,
33 it's not only consideration in any project. Sometimes it's waived up there as a bloody
34 shirt. But it's not the only consideration. And it doesn't, necessarily, trump others, which
35 are also important for public policy: consistency, compatibility, density, and so on. I think
36 I agree with the Hearing Examiner that this is not the way to do it. It needs to be done in
37 a different way. And there are options, as talked about, in order to achieve this end that
38 is proposed by the applicant. That's where I come down on this. I think...I understand
39 how the Hearing Examiner got to her conclusion, and I respect it.

40
41 Francoise Carrier,

42 It might be useful for me to point out that the options are somewhat narrowed by the fact
43 that we have a live application. If the Council denies this application, even if this master
44 plan is amended, or the PD zone is amended, nobody can seek PD zoning for this
45 property again for three years.



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Council President Leventhal,
Mr. Subin.

Councilmember Subin,

Ever since I was in law school, I've loved the phrase that says that whatever is written is obvious, whatever the plain language is. I've never found anything, or any phrase in the law, that turned out to be plain language, because the assumption, there, is that everybody agrees what it means. I've never found a phrase where everybody agreed what that means. I want to go back. Folks want to play the legal game, here, to the purpose clause of the PD zone. The PD zone, "it is intended that the zoning category be utilized to implement the general plan, area and master plans, and other pertinent county policies." I'll say that's plain language. "In a manner, and to a degree, more closely compatible with said county plans and policies than maybe possible under other zoning categories. This zone is in the nature of a special exception and shall be approved to disapprove upon findings that the application is or is not proper for the comprehensive and systematic development of the county." Now, the master plan was put into place in 1994. And at that time, there was one set of assumptions and issues regarding what was comprehensive and systematic. Over the past 20 years, a lot of that has changed. When is a master plan old? I don't know. It could be the day after it's done and approved, because somebody comes in with, all of a sudden, a better idea. That happens. Now, the credibility of that day after is shaky, but after 20 years I would say things and circumstances change. That's why master plans are supposed to be amended after 20 years. And we have bemoaned the fact they are not for 30 sometimes 40 years. And the longer that they are in existence, the more the circumstances change. One of the great hidden secrets of this growth debate is that traffic on 270, in part, not in full, but in part, is as bad as it is because growth has been pushed out of this county in terms of residential areas that are affordable. And so folks are going up to Frederick and Carroll County. They are going to Gettysburg, West Virginia, and Pennsylvania. But guess where they are working? A lot of people are working at this building kind of in the lower center. That's a hospital, and in the back is a rehab facility. Why are they working there and living somewhere else? They can't afford to live here. Now, whether it's a market-rate condo or an MPDU two blocks away, that appears to fit, and from what I've been reading are the policies that the Council has been leaning towards over the last few years, which is to get affordable housing, get it within the county, get it in job areas, so that people can walk to work or take transit to work, which is exactly the type of policies that are being addressed in this application. Again, my arguments are not specifically for this application, although that's what we are here for. But they are much broader. And, again, either there's going to be some consistency, if you want it in the law, it's here. If you want it in the policies, it's here. If you want it in the rhetoric, it's here. But it seems, to me, I'm hearing one more instance of we all love MPDUs, and we all love residential and that should be the policy. But we can't vote for this, because...fill in the blank. And here is another blank. And the blank, this time being, because 22 years ago the Council that implemented this was looking at one set of assumptions and those policies have changed. If the PD zone is rejected here, it's rejected for another three years, it would take at least that long to put in a Master Plan Amendment. And so the policies of putting in affordable housing in the Shady Grove Area will be laid aside for at



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1 least three years. When in fact, the goal, the stated purpose of PD zone is to consider
2 other county policies that fit in with the vision of what that development is supposed to
3 be.

4
5 Council President Leventhal,
6 Ms. Floreen.

7
8 Councilmember Floreen,

9 I just wanted to say I don't think anything that we do here is black and white, as some
10 would believe. And the real issue is, are we going to use PD zone, regardless of what it
11 says, to achieve policies that we don't disagree with? I think that's the challenge. I
12 don't...we have another item on our agenda that we'll deal with later today where we've
13 had this...a comparable argument at least where it's about residential density, and
14 what's appropriate, and how does compatibility work. In this case, the real issue is, are
15 we going to start reading the ordinance in order to achieve other objectives? I have a
16 problem with that. The master plans are challenges, especially the older ones. And
17 we're looking at ways to improve how we address this statement of public policy. But I
18 do think they are entitled to some significant respect. If the approach we are to take is to
19 suggest that wherever a special exception is permitted, under appropriate
20 circumstances, that, by and of itself, changes the master plan recommendation,
21 regardless of anybody having thought about it previously. I think we're going to dig our
22 hole in credibility even deeper. These are difficult cases. And I am sorry that we're in a
23 situation where we have received conflicting recommendations. But I...and I'm very
24 sorry that this issue was not looked at in the same light by the Planning Board, because
25 they are the custodians of master plans, as far as I'm concerned. I think the Hearing
26 Examiner is right on that. I move approval of the Hearing Examiner's recommendation
27 to deny.

28
29 Councilmember Andrews,
30 Second.

31
32 Council President Leventhal,
33 Okay. Ms. Floreen has moved, and Mr. Andrews has seconded approval of the
34 resolution that is before the council. That is the Hearing Examiner's recommendation to
35 deny the applicant. Mr. Silverman.

36
37 Councilmember Silverman,

38 Thank you. I would vote to approve this. This is a great project. The Hearing Examiner
39 says it's a great project. It's going to produce housing units instead of office buildings.
40 We've got a housing crisis. It's going to provide affordable housing units. It's going to
41 generate a fraction of the traffic that would be there under the office development that
42 they could do by right. This is exactly what we did when we did -- I mean policy wise,
43 exactly what we did in Bethesda with the Woodmont Triangle. We substituted
44 commercial for residential, put residential in there. And that's not contravened in the
45 Hearing Examiner's report. There was no opposition to this. The Planning Board staff
46 supported it. And the Planning Board supported it. Now, the Planning Board has a long



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1 track record, as I recall, of opposition of doing things by zoning text amendments. They
2 don't like us to do that. But I don't think anybody can recall them going down a path of
3 saying well just because you want to have a policy to support affordable housing, or to
4 support housing, that therefore, you ought to just completely twist the zoning ordinance
5 to serve the purpose. And I'm going to support...I would support this, because of the
6 rationale of the Planning Board. I appreciate the fact that the Hearing Examiner has
7 changed her mind. It hasn't changed my mind. It, obviously, didn't change the Planning
8 Board's mind.

9
10 Francoise Carrier,
11 They didn't know I had changed my mind. I'm sorry.

12
13 Councilmember Silverman,
14 Well, there you have it. They, in fact, relied on you. Relied on the case you decided
15 three years ago. I respect the fact that we all grow in our jobs. We still have the ability to
16 approve a great project, which is obviously not going to occur, since I can count.

17
18 Council President Leventhal,
19 As with other similar, but not identical cases that have come before the Council
20 recently, this is a very tough call. For me, a critical point that's weighing on my mind is
21 this particular area is not well served by transit. Where we had discussion recently
22 about -- I realize other cases are not necessarily the basis on which we are going to
23 vote here. But where you have a situation where someone is right at metro in what is
24 clearly one of our most dense and active urban areas, right out of Metro Station, there
25 are certain issues that come into play. I'm also concerned about the whole pattern that
26 was set some years ago by Euclidian zoning. We're, now, obviously turning away from
27 the concept that commercial should all be located in one place, industrial should all be
28 located in another place, and residential should be located far away from that. On the
29 other hand, I don't see that there's any guarantee that those who move into particular
30 buildings are going to work at the offices that are right next door to that building.
31 People's housing and work patterns are sort of random, and have to do with family
32 issues, and the luck of the draw, and what you're trained for, and what you're educated
33 for. And we make a lot of assumptions that if you locate housing right next to offices; the
34 people that live in that housing are going to work in those offices. And I don't know that
35 those assumptions are actually going to bear out, because housing choices are subject
36 to so many other factors. I listened very carefully to Ms. Floreen's questions about the
37 language in the master plan, and how do you get away from language in the zoning
38 code that says there must be a justification for this in the master plan. And I heard the
39 Hearing Examiner make that strong case. I think this is a tough judgment call, but I don't
40 see, at this point, enough of a compelling justification for what appears to be language
41 in the zoning code that doesn't allow this. So, I will vote with the Hearing Examiner at
42 this time. The clerk will call the roll.

43
44 Clerk,
45 Mr. Denis.



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Councilmember Denis,

Aye, for the motion. A vote, aye, for the motion that was made.

Clerk,

Ms. Floreen.

Councilmember Floreen,

Yes.

Clerk,

Mr. Subin.

Councilmember Subin,

No.

Clerk,

Mr. Silverman.

Councilmember Silverman,

No.

Clerk,

Mr. Andrews.

Councilmember Andrews,

Yes.

Clerk,

Ms. Praisner.

Councilmember Praisner,

Yes.

Clerk,

Mr. Leventhal.

Council President Leventhal,

Yes. The finding of the Hearing Examiner is affirmed by a vote of 5-2. And the Council stands in recess until the hour of 1:30.



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1 Council President Leventhal,

2 This is a continuation of the September 21st public hearing on Zoning Text Amendment
3 06-23, which would amend the zoning ordinance to define a place of assembly, allow
4 temporary signs of a certain size at any place of assembly, and generally amend
5 provisions related to signs for a place of assembly. The record will close immediately at
6 the end of the hearing. The PHED committee is tentatively scheduled to take this up on
7 September 28th at 2:00pm. We have three witnesses. Mr. Gregg Russ, Steve Klitsch,
8 and Carolyn Roberts. Please join us. All witnesses, please, join us. And Mr. Russ, if you
9 will begin, please state your name and address for the record.

10
11 Gregg Russ,

12 Thank you, Mr. President. For the record, Gregg Russ, from the Montgomery County
13 Planning Board. The Montgomery County Planning Board reviewed Zone Ordinance
14 Text Amendment Number 06-23 at its regular meeting on September 14, 2006. The
15 board recommends that the proposed text amendments be approved as introduced.
16 The proposed text amendment, as introduced, defines a place of assembly, allows
17 temporary signs totaling 50 square feet at any place of assembly, and generally amends
18 provisions related to signs for a place of assembly. The board believes that establishing
19 a definition for a place of assembly, in the appropriate definition or section of the zoning
20 ordinance, is consistent with existing zoning practice. The second provision of the text
21 amendment recognizes the special needs of a place of assembly for temporary signs,
22 similarly as allowed for permanent signs. The proposed text amendment would limit the
23 total area for temporary signs for places of assembly to 50 square feet. The board
24 believes that the proposed provision would assist in promoting special events to be
25 located at the site of a place of assembly with minimal impact on surrounding
26 properties. I'm also speaking on the next text amendment. And my time is consolidated
27 as such. The second text amendment, 06-22, the Planning Board heard this case on
28 September 21st of this year. The board unanimously recommends that the text
29 amendment be approved as amended and included in the technical staff report. The
30 text amendment proposes to show real estate offices as a permitted use in the C-1 and
31 C-2 zones since general office uses are already permitted in these zones. General
32 office, with a definition that actually includes real estate companies, is a permitted use in
33 the C-2 zone while professional and business offices, including real estate offices,
34 according to the definition of general office, are permitted uses in the C-1 zone.
35 However, the use table in the code only shows office real estate as a permitted use in
36 the C-3 and C-4 zones. The C-1 and C-2 zones are blank in the line-use table, which
37 seems to imply that real estate offices are not, in fact, permitted. This text amendment
38 will correct that by specifically showing real estate offices as permitted uses in the C-1
39 and C-2 zones. The board believes that real estate offices could be included in the C-1
40 and C-2 zones without policy implications. However, the board recommends that real
41 estate offices be permitted in the C-1 zone with a footnote that restricts the maximum
42 floor area percentage to 50 percent of the total growth floor area on tracts of five acres
43 or more. This language is consistent with that of the profession and business office
44 language located in the C-1 zone. Thank you, Mr. President.



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1 Council President Leventhal,
2 Thank you for your testimony. Steve Klitsch. Press the button there. Right.

3
4 Steve Klitsch,
5 Good afternoon. My name is Steve Klitsch. I'm a lay member and the marketing director
6 for Trinity United Methodist Church located in Germantown, Maryland. Our concern is
7 about sign usage. We feel that a church, or a house of worship, is the ears and eyes of
8 our community. Therefore, sometimes, we learn of situations that we can reach out
9 through our outreach ministries through various programs. But, in order to make our
10 community aware of these outreach programs and other activities at our church, that we
11 feel that if we posted a temporary sign, not to exceed more than 30 days in appearance,
12 not greater than 50 square feet, something that can be professionally and neatly
13 arranged on our property to make our community aware of the many different functions
14 that our church organization can offer to our community. So, we want to encourage the
15 Council to consider this change, so we can promote our activities in our outreach
16 ministries within our community. Thank you.

17
18 Council President Leventhal,
19 Very good. Thank you. Carolyn Roberts.

20
21 Carolyn Roberts,
22 I'm the Reverend Carolyn Roberts. I'm pastor of the United Church of Christ of Seneca
23 Valley in Germantown. I want to begin by extending a particular word of gratitude to
24 Councilmember Leventhal and to your office for the attention that you've given to this
25 whole issue of signage, as it impacts our communities. Our congregation is very modest
26 in membership size. But we're richly blessed by the dedication and vision of our founding
27 members in purchasing five acres of, what was then farmland, complete with cows that
28 occasionally broke the fence and wandered on to our property. When our church
29 buildings were built 22 years ago, they were at grade level with a two-lane country road
30 that ran across the front of our property. But when that road, State Highway 117, was
31 widened for development, and the increased traffic that followed, a deep burm was
32 created and now our church is nearly invisible from the street. Furthermore, regardless
33 of the posted speed, traffic often travels by at roughly 40 miles an hour, sometimes
34 more. So, the amount of time anyone has to read a sign that indicates our presence, or
35 any other information, is a matter of seconds at best. Like our congregation, our
36 denomination is very modest in size. About three years ago, the United Church of Christ
37 began a nationwide initiative to let people know who we are. It's called "The God is Still
38 Speaking Campaign" and has produced rather memorable TV spots known for
39 bouncers standing in front of a neo-gothic church, and for a wide variety of people being
40 ejected from church pews. Along with the TV spots, the UCC produced distinctive black
41 and red banners with a quote from that well-known theologian Gracie Allen. In a note
42 discovered by her husband, George Burns, following Gracie's death, George was
43 reminded that God is still speaking. We were delighted to hang the 12-foot by 6-foot
44 banner on our property where it was clearly visible and readable for traffic passing in
45 both directions. Guests would tell us that they had seen the banner and visited us,



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1 because of its welcoming message. And then, we learned that it was not in compliance
2 with Montgomery County regulations. My friends, for us it's a catch 22. If we're in
3 compliance with county regulations, people can't read the signs. The square footage for
4 the signs is too small, and therefore, the print is even smaller. Current regulations are
5 more in keeping with those for a homeowner than for an institution. So, I urge you to
6 adopt the legislation that considers the needs of congregations such as ours. Thank
7 you.

8
9 Council President Leventhal,

10 Thank you Reverend Roberts. Let me just make a quick comment, and there are a
11 couple of questions as well. I want to thank Mr. Knapp and Mr. Silverman for co-
12 sponsoring this ZTA. And I want to particularly want to thank Mr. Knapp who, along with
13 me, has been working. We scheduled, and all my colleagues. I want to thank all of my
14 colleagues who attended the town meeting for religious leaders that we held in the
15 month of June. Mr. Knapp recently organized a follow-up meeting to that, which I
16 attended. And we are going to be discussing other follow-up items. This signage ZTA is
17 the first follow-up item that emerged from that town hall meeting in June. And it is my
18 goal, working with staff, and I want to let all my colleagues know, that I'm hoping we can
19 schedule a second town meeting with religious leaders in the month of November. So,
20 although the Council will be in recess, the Council will not be meeting in the month of
21 November, I'm hoping we'll be able to schedule our second town meeting with religious
22 leaders. And there are a number of follow-up items that we've been discussing. This is
23 the first action item. And I'm pleased the Council has been able to take it up so
24 expeditiously. We will be working with all of your schedules to identify a date in
25 November when we can hold this second town meeting with religious leaders. And Mrs.
26 Praisner has a question.

27
28 Councilmember Praisner,

29 I apologize. I should have raised this question when we introduced this ZTA. The
30 language that we have in front of us deals with the authority for an additional permanent
31 sign. But it doesn't say about square feet coverage, et cetera, as it relates to the
32 permanent sign. And then on the temporary sign, and I do think there are ongoing
33 issues about what's temporary and what's permanent, that have evolved over time. But
34 on the temporary sign, if I'm reading it correctly, it talks about the square coverage, to
35 the extent we're talking about the banner or some of these others, they appear -- well,
36 banners may, over time, need to be replaced or -- but are more permanent than
37 temporary, potentially. And I wondered about what isn't here more than what it is here.
38 And I hope when we have the committee meeting, you can discuss signs in general and
39 the temporary permanent and the size limitations. The other point I wanted to make is,
40 the temporary sign limitations relate to the residential zone. But we've also talked about
41 encouraging more places of worship to be physically located in commercial and other
42 zones. I wanted to have reminded for the committee discussion, what the sign
43 requirements would be in a commercial zone if a religious institution were located there.
44 So, we can have a packet that may be -- it may be beyond the advertisement, but also



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1 speaks to some of these other issues that are absent from the conversation as
2 presented in this ZTA. Thank you.

3
4 Jeff Zyontz,
5 We'll do our best. Our work session is Thursday.

6
7 Council President Leventhal,
8 Mr. Knapp.

9
10 Councilmember Knapp,
11 Thank you, Mr. President. I thank you for your efforts in this issue. I think as we started
12 having discussions with the faith community last year, primarily, as was related to
13 zoning. We found a number of issues that we just weren't aware of. So, I thank you for
14 bringing this to our attention. And both of your congregations are situated, both very
15 well, because you're readily accessible. You're just over the burm. And you're just kind
16 of turned the other way from the road. And so, it was very difficult for you to kind of let
17 people know what's going on. And so, I thank you for your advocacy. I was intrigued,
18 because there was another church a little further up Clopper Road this summer that
19 actually employed a unique strategy. I'm not sure if it would actually be characterized
20 as a sign or not, but in order to announce their vacation Bible school, what they did was
21 to use beach towels. And they had a series of beach towels strung along with a letter on
22 each beach towel. And so, I'm not sure if that would have been within the ordinance or
23 not, but I thought it was a unique approach.

24
25 Carolyn Roberts,
26 I noticed that too and had the same reaction.

27
28 Councilmember Knapp,
29 That's one way to get around it. I thank you very much. And I would encourage you and
30 your colleagues, if you other issues similar to this, to continue to make sure you to bring
31 them to our attention.

32
33
34 Council President Leventhal,
35 Ms. Floreen.

36
37 Councilmember Floreen,
38 Thank you. Mr. Zyontz, when this first came up for introduction, I asked that the notice
39 be written in a way, so we could -- it would permit attention to flexibility in the signage,
40 generally. And did we achieve that?

41
42 Jeff Zyontz,
43 It certainly is broad enough to do anything with places of assembly and signs. It wasn't
44 completely open to all signs anywhere, every time, every place. And there are two --



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1 there is one existing reference to places of assembly for the entrance signs on a
2 permanent basis. I am introducing a second reference for it on the temporary one.

3
4 Councilmember Floreen,

5 The concern I had had was sort of how it might be all added up. For example, what
6 we've just heard from Reverend Roberts is, there will need for frankly a larger banner
7 than I think will be permitted under what the temporary calculation. But I'm not sure how
8 that would apply to permanent calculations. So, will we be prepared to discuss that on
9 Thursday?

10
11 Jeff Zyontz,

12 Yes.

13
14 Councilmember Floreen,

15 I want to make sure that issue is fully addressed. So, you're saying, then, that there's
16 more flexibility to look at the permanent -- the measurement for permanent sign?

17
18 Jeff Zyontz,

19 Yes, as it relating to places of assembly.

20
21 Councilmember Floreen,

22 Okay. Good. Thank you.

23
24 Council President Leventhal,

25 Okay. That's all for questions. Thank you to our witnesses. And on Thursday the PHED
26 committee will take this up. Thank you very much. We now turn to a public hearing on
27 Zoning Text Amendment 06-22, which would amend the zoning ordinance to add real
28 estate offices as a permitted use in C-1 and C-2 zones, and generally amend permitted
29 uses in the C-1 and C-2 zones. The record will close immediately at the end of the
30 hearing. The PHED committee is taking this up also on September 28th. We have two
31 witnesses, Meredith Weisel and Eileen Finnegan. Please, go ahead Meredith.

32
33 Meredith Weisel,

34 Just for the record, I'm Meredith Weisel. I represent the Greater Capital Area
35 Association of Realtors. You have my written testimony, so I'm not going to go through
36 it. But, Gregg, basically laid out sort of what the issue is, what the problem has been.
37 And the reason this issue came forward, and we want to thank Councilmember Praisner
38 for addressing the issue of some of her constituents, was that particular real estate
39 company, and I will not name what the real estate company was, went to the
40 Department of Permitting Services to get a permit to put in a real estate office in one of
41 the C-1 -- I think it was C-1 zone, not a C-2 zone, which essentially was like a strip mall
42 and they were denied the request. They didn't understand why. So, they did a little bit of
43 research, because previously another real estate company, several years back, was
44 actually in that area -- in that particular space. So, they didn't understand what the
45 problem was. Further research between them and myself and then talking with



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1 Councilmember Praisner, we found out why. When you look in the zoning ordinance, it
2 doesn't exactly allow real estate offices based on the table when you go through in a C-
3 1 and C-2 zones. There are various real estate offices throughout the county in C-1 and
4 C-2 zones already. So, this is more of a clean-up to make sure that this doesn't happen
5 again, since it already does exist. That's really how the issue came to the forefront. And
6 we've just -- you know would state this is a great location, C-1 and C-2 zones,
7 particularly in the strip malls, because it's a great area for home buyers and for potential
8 sellers to find and locate. It's convenient. It has convenient parking. It's just a good area
9 to keep real estate offices. And because they already exist there, we'd just ask that you
10 approve the zoning text amendment as it is. Thank you.

11
12 Council President Leventhal,
13 Thank you. Ms. Finnegan.

14
15 Eileen Finnegan,
16 I am Eileen Finnegan.

17
18 Council President Leventhal,
19 Press the button.

20
21 Eileen Finnegan,
22 I am Eileen Finnegan. I'm testifying on behalf of Hillandale Citizens Association Board.
23 We've discussed the ZTA, and would like to provide Council and PHED committee's
24 comments, which not only pertain to the ZTA, but also to the need for more
25 comprehensive review of the county's commercial zoning code. We've been informed,
26 and it's been reiterated, that this ZTA essentially cleans up language in DPS'
27 inconsistent application of the current code. It seems that sometimes real estate offices
28 are allowed, and sometimes they're denied. So, the practical solution is to make these
29 offices clearly permitted. On this basis, the ZTA seems reasonable. As an association,
30 we do not have a specific objection, but we do want Council to recognize the effect that
31 this change will have on neighborhood retail zones. For example, because of this ZTA,
32 our [Hill and Dale] shopping center now has a rather large real estate settlement office
33 occupying a storefront location that was previously an independent restaurant. A use in
34 occupancy certificate was applied for in May and was approved in August by DPS
35 based on this ZTA being a technical correction ready for approval. What the community
36 has lost is a true retail location for either a local ethnic restaurant, and we're thinking
37 [Samantha's], [El Golfo's], The Greek Village, or some other neighborhood retail. Our
38 area, like most, has COs, CTs and the newly zoned OM space for offices. What we
39 don't have are restaurants and other retail to meet our needs. We ask that Council
40 undertake the comprehensive zoning, commercial zoning review that was
41 recommended by the Clarion Associates, and have been given lip service for far too
42 long. Hillandale has firsthand experience with the inadequacies of our commercial code
43 being involved with a lengthy and very expensive administrative appeal. The last
44 comprehensive review of the C-1 zone was in 1971. The C-2 was done in '76. Not all
45 the land that is zoned commercial will be redeveloped into the newer mixed-use zones



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1 that are being contemplated today. Older zones need to be preserved and nourished by
2 attention to the existing zoning categories. On a different note, this ZTA reproduces the
3 line in the table regarding pawnshops. It's not clear why, but it sends a dagger to our
4 heart in Hill and Dale. Although it appears no changes are proposed, HCA firmly and
5 adequately request for any request for permitting this operation in a C-1 continue to be
6 rejected. An error or lack of enforcement by DPS allowing this use in a C-1 should not
7 now be corrected by council. I thank you for the opportunity to comment.

8
9 Council President Leventhal,
10 Thank you. Ms. Praisner.

11
12 Councilmember Praisner,
13 Thank you, Eileen. And I share your desire to have the commercial zones re-examined
14 by the Planning Board on a fast-track process, which would be anything that has it
15 being reviewed, in my view given the fits and starts. I'm not sure I understand. I think the
16 only reason staff lifted pawnshop is because it was the next one in line and to give you
17 a context of where it's placed. No one is advertising, introducing, or suggesting any
18 change in pawnshop just for alphabetical and for placement context. Correct, Mr.
19 Zyontz?

20
21 Jeff Zyontz,
22 Yes, correct.

23
24 Councilmember Praisner,
25 Okay That should satisfy that.

26
27 Council President Leventhal,
28 Okay. That's it. Thank you both. That concludes our public hearing. We now have -- if I
29 can just find my agenda, I can tell you what we now have. I lost my agenda. We now
30 have amendment to the Zoning Ordinance Map G-842 and Development Plan
31 Amendment 06-2. We have...the Council acted on this last week, but we have a
32 redrafted resolution. Thank you to Mr. Zyontz, of our staff, for his speedy drafting of a
33 new resolution. That resolution is now before the council. I guess we need a motion to
34 bring it up. Can we get a motion to bring up the resolution, which approves the
35 applicant's request? Okay. Ms. Floreen has moved. And Mr. Subin has seconded the
36 revised resolution regarding application numbers G-842 and Development Plan
37 Amendment 06-2. That matter is now before the council. Is there discussion?

38
39 Female,
40 No.

41
42 Council President Leventhal,
43 Well, a motion has been made and seconded. And the resolution is now before the
44 council. An amendment is in order, if you want to offer one, Mr. Denis.



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1 Councilmember Denis,
2 No, just a parliamentary inquiry. Is the motion before us the same as the straw vote that
3 occurred last week?

4
5 Council President Leventhal,
6 It is.

7
8 Councilmember Denis,
9 Okay. Okay.

10
11 Jeff Zyontz,
12 Just on technical terms, this is your formal action on the zone. The effect of your straw
13 vote was only to direct staff to write the opinion conformed to the majority at the time.
14 This is your real vote on this issue.

15
16 Council President Leventhal,
17 Mr. Andrews.

18
19 Councilmember Andrews,
20 Thank you Mr. President. Well, as I indicated, last week, I'm going to vote against it. I
21 think the choice, here, is between having a plan redone that would be a little less in
22 height. We're talking about a delay of, let's say, half a year or so versus permanent
23 incompatibility, in my view, with the neighborhood to the adjacent neighborhood,
24 because of the 70-foot height. So, that's how I see this issue. In terms of the number of
25 affordable units that might be changed, we might be looking at one or two difference.
26 You're looking at nine affordable units in the proposed development. If it's scaled down
27 to 50 feet or so, you might lose a couple, maybe you wouldn't. Depends on how it's
28 designed. But I see the disadvantage of going forward as permanent incompatibility with
29 an existing neighborhood. That's why I don't support the motion.

30
31 Council President Leventhal,
32 Mr. Denis.

33
34 Councilmember Denis,
35 Thank you, Mr. President. I support the Hearing Examiner in this recommendation that
36 this be remanded to the Planning Board. Struck by something Brian Billick said after the
37 Ravens won on Sunday. He said, "I'll repeat myself at the risk of repeating myself." So, I
38 guess I'll repeat myself a little bit at this particular time. But I agree with the Hearing
39 Examiner. As I said last week, this matter should be remanded to the Planning Board. I
40 would emphasize, lest there be any doubt, that this is a remand to the Planning Board.
41 It's not a denial and it's not a remand to the county council, or anything of that nature.
42 Always very sensitive to development plans that exceed master plan height limitations.
43 Much was said last week about our commitment to building affordable housing. I
44 understand. And I think it should be made clear that whatever happens with this
45 proposal, the much needed Housing Opportunities Commission Project to build housing

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1 for the formally homeless will not be in jeopardy. Remanding this matter will provide
2 another opportunity to rework the development proposal to bring it in line with the
3 master plan height limit and urban village concept. And I did check with Marc Hansen,
4 our acting county attorney, because even though the record is closed, I do not want to
5 stray from the record in making my argument. But I do want to make something in the
6 nature of Council notice, akin to the judicial notice, that Mr. Subin eluded to last week by
7 reminding us that the sun rises in the east and sets in the west, or appears to. The
8 notice, I think, the Council should take is that we sent[Royce Hanson to the Planning
9 Board. An much was made, at the time, that we were doing this for the purpose of
10 having a fresh look taken at various matters. And I certainly agree with that. And that is
11 one of the reasons that I supported that action. And this, to me, is exactly in keeping
12 with the intention of the council, to let the newly reconstituted leadership of the Planning
13 Board take a look at this in view of the all the issues that were raised, and the three-
14 hour argument on technicalities that we heard last week. There are not really two sides
15 here, if I may say so, those who want the project and those who may not want the
16 project. There's a third side, the umpire, so to speak. And that's the Hearing Examiner,
17 and that's us. And I do believe, as we did this morning in a somewhat similar vain, I do
18 think that we should give deference to the Hearing Examiner and not to follow slavishly
19 whatever the Hearing Examiner recommends. That certainly should never be the case.
20 But I do believe something in the nature of rule to show cause, or an order to show
21 cause, something along those lines. Otherwise, why have a Hearing Examiner at all?
22 Why not simply have these matters referred to the Council with those who are for and
23 those who are against? I think one of the reasons that we structured this system the
24 way we did is because there may be circumstances, as there is in this case, where
25 those who take a contrary view to the applicants do not have an attorney, a land use
26 lawyer. Either they cannot afford to hire one, or whatever may be the case. And I think
27 that makes it even more incumbent upon us to listen very carefully to what our Hearing
28 Examiner has to say. And with all of the questions that were raised last week, I truly did
29 not see the Hearing Examiner's logic dented at all in this matter, so far as a
30 recommendation of expertise and integrity to this council. In view of the fact that the
31 recommendation is to remand to the Planning Board, which, yes, it would take a couple
32 or few months, or whatever the case may be, and maybe that there maybe some
33 activity in the intervening time, I mean, who knows. I do believe that that is the way we
34 should go. So for that reason, I do support the Hearing Examiner, in his
35 recommendation to the council, for remand to the Planning Board.

36
37 Council President Leventhal,
38 Ms. Floreen.

39
40 Councilmember Floreen,
41 Thank you. We have the proposed changes to the Council opinion on this before us, I
42 gather. The ones that are presented are the changes that the Hearing Examiner has
43 made to accommodate what the motion was last week?

44
45 Marty Grossman,



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1 Right. These are the significant paragraphs, have been highlighted by Mr. Zyontz, to
2 bring to the attention of the Council what has been changed in the resolution, in addition
3 to the final recommendation of it.

4
5 Councilmember Floreen,
6 I know. To change the deny to approve, or remand.

7
8 Marty Grossman,
9 Right. But it also has...some additions were made to the language, some talking about
10 the policies in favor of MPDUs, part of the sense of the council's debate. And also an
11 expectation that the Council has, that the Planning Board would look at this at site plan
12 carefully in terms of its height, but also taking into account compatibility and MPDU
13 goals. So these are various paragraphs that address those issues.

14
15 Councilmember Floreen,
16 Right. With that, Mr. President, I move approval of the Hearing Examiner – of the
17 revised opinion. And approval –

18
19 Council President Leventhal,
20 Right. We already have that motion before us.

21
22 Councilmember Floreen,
23 — of the application. I just want to say, we did have this extensive conversation last
24 week. Covered a lot of ground. And I think this accurately reflects the council's view.
25 The site plan, the devil is in the details and that will continue to be committed to the
26 Planning Board.

27
28 Council President Leventhal,
29 Okay. Well, as I voted in the straw vote last week, I'm going to vote for the motion today.
30 These are not easy calls. We have opponents who make some arguments that are
31 strong regarding their expectations when they purchased their homes, and whether
32 there may be some infringement on their light and on their views. On the other hand, we
33 are talking about a property that is, if not right at metro, it's about two blocks from metro.
34 The Council clearly spoke in favor of higher building heights to facilitate MPDUs in a
35 Metro Station Policy Area. And this -- if this doesn't meet the definition of smart growth, I
36 don't know what does. I know that there will be -- I know that there will be opponents of
37 this building who will be disappointed. I'm sorry about that. This is the difficulty of sitting
38 where we sit of trying to achieve certain public policy outcomes at the risk of maybe
39 harming some other public policy outcomes. I understand the concern about
40 compatibility. On the other hand, I didn't get a chance to say last week, and then I said it
41 later in the hearing, I want to alert Mr. Grossman, that when this Council takes up the
42 Green Buildings Legislation now pending, one of the goals of the Green Buildings
43 Council, which promulgates LEEDS is a lot of glass, because a lot of ambient light
44 reduces the amount of expenditure for artificial light. So, it's good energy conservation
45 practice to have big windows. And I anticipate that if this Council adopts Green



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1 Buildings Legislation and encourages LEED-friendly construction, you're going to see a
2 lot more glass, including a lot more glass in neighborhoods that are primarily brick. So,
3 whether it's environmental, whether it's affordable housing, whether it's smart growth,
4 whether it's proximity to metro, all of these things may mitigate against compatibility in
5 neighborhoods that are -- that were established with other goals in mind, or that may
6 have been established some time before. And if we are in the mist of a changing policy
7 environment, if we're moving in the direction of smart growth, if we're moving in the
8 direction of taller building heights at metro to accommodate affordable housing, and if
9 we're going to move in the direction of environmentally sustainable construction, green
10 buildings, those are going to lead to the creation of buildings that look different than the
11 buildings that were created in the past. So, I don't know that compatibility can be the
12 governing precept in all these cases. In this case, with this building, I'm not voting to
13 allow compatibility to govern. Although, I acknowledge that there is some conflict with
14 compatibility. And I recognize it's a challenge. It's a challenge to meet all these
15 competing objectives.

16
17 Marty Grossman,

18 The zoning ordinance, regarding development plans, those zones that require
19 development plans, as this one does, calls for a finding of compatibility by the council.
20 So, it is built right into the zoning ordinance.

21
22 Council President Leventhal,

23 Well, we may need to take a look at that as we talk about green building technology.
24 That's going to be something we may have to address. If a new mode of building is
25 determined by the Council to be something we want to encourage, by definition, it's
26 going to be new. And it will not look like prior building styles look. So, that's something
27 we're going to have to be thinking about in a next few months. The clerk will call the roll.

28
29 Clerk,

30 Mr. Denis.

31
32 Councilmember Denis,

33 Is an aye vote to remand, or is an aye vote is for ——?

34
35 Council President Leventhal,

36 No. A yes vote is a vote for the resolution that implements the straw vote of the Council
37 last week, that is approval of the application.

38
39 Councilmember Denis,

40 Then I vote no. Thank you.

41
42 Clerk,

43 Mr. Floreen.

44
45 Councilmember Floreen,



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1 Yes.
2
3 Clerk,
4 Mr. Subin.
5
6 Councilmember Subin,
7 Yes.
8
9 Clerk,
10 Mr. Silverman.
11
12 Councilmember Silverman,
13 Yes.
14
15 Clerk,
16 Mr. Knapp.
17
18 Councilmember Knapp,
19 Yes.
20
21 Clerk,
22 Mr. Andrews.
23
24 Councilmember Andrews,
25 No.
26
27 Clerk,
28 Mr. Perez.
29
30 Councilmember Perez,
31 Yes.
32
33 Clerk,
34 Ms. Praisner.
35
36 Councilmember Praisner,
37 No.
38
39 Clerk,
40 Mr. Leventhal.
41
42 Council President Leventhal,
43 Yes. The resolution passes by a vote of 6-3. And the Council stands adjourned.
44



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1 Jeff Zyontz,

2
3 If I can just thank, Mr. Grossman, for his help on this. I really do appreciate being new to
4 the council. Thank you.

5
6 Council President Leventhal,
7 Thank you, very much. The T&E Committee will meet here, is that right, Madame
8 Chair?

9
10 Madame Chair,
11 Sure.

12
13 Council President Leventhal,
14 And the Education Committee is meeting in the sixth floor conference room. And
15 Madame Chair, will the T&E meet immediately, or you want to take a break, or what do
16 you want?
17